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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 820

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, CAL CHAPTER, PETITIONER

vs.

CONTINENTAL AIR LINES, INC. AND THE AIR LINE PILOTS ASSOCIATION INTERNATIONAL, AFL-CIO, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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vs.

CONTINENTAL AIR LINES, INC. AND THE AIR LINE PILOTS ASSOCIATION INTERNATIONAL, AFL-CIO, RESPONDENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Flight Engineers' International Association, AFL-CIO, CAL Chapter, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court below (Appendix A, *infra*, p. 21) is not yet reported officially or unofficially.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The judgment of the Court below was entered on October 23, 1961. Petitioner filed a timely motion for rehearing en banc to the Court below which was denied December 7, 1961. By an Order dated March 2, 1962, this

Court extended the time for the filing of a petition for writ of certiorari in this cause to and including March 27, 1962.

Jurisdiction of the District Court was based primarily on 28 U.S.C. §§ 1331, 1337, and on 28 U.S.C. § 2201 et seq.

QUESTIONS PRESENTED

1. Does the duty of a Federal Court to enforce by appropriate decree the statutory scheme to promote collective bargaining and to protect the freedom of choice of bargaining representatives under the Railway Labor Act, 45 U.S.C. § 151, et seq., survive a course of conduct by a carrier, in violation of the Act, whereby said carrier succeeds, through bargaining with the individual employees, in obtaining a dissolution of the Union the employees had theretofore selected as their collective bargaining representative?

2. May a carrier subject to the Railway Labor Act, as justification for making moot a suit to compel bargaining with the labor organization freely chosen by his employees to represent them, set up the loss of a majority or the dissolution of that labor organization which the employer induced by conduct violating the Act?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are set out in Appendix B, p. 32, infra.

STATEMENT[1]

Petitioner (CAL Chapter) is a labor organization which bargained for many years with respondent Continental Air Lines, Inc. (Continental) on behalf of its members, the flight engineers employed by Continental.[2] Respondent Air Line Pilots Association (ALPA) is a labor organization which has represented the pilots employed by Continental.

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[1] References designated "R" are to the Transcript of Record in the Court below, which is on file with the Clerk of this Court.

[2] In 1953 CAL Chapter filed an application for certification by the National Mediation Board under the Railway Labor Act. However, no election was held and no certification issued because Continental notified CAL Chapter that it would voluntarily extend recognition since it agreed that CAL Chapter had been designated by a majority of the flight engineers. On that basis, the National Mediation Board closed its files in the representation case. (R. 30, 103.)

On May 29, 1959, during the life of a collective bargaining agreement with CAL Chapter covering all flight engineers in its employ, Continental entered into an agreement with ALPA establishing terms and conditions of employment for flight engineers assigned to turbo-jet aircraft different from those provided in the existing agreement with CAL Chapter.[3] In essence, this agreement, which was to go into effect upon the expiration of the then-existing agreement with CAL Chapter, changed the job title of the turbo-jet flight engineer to "Second Officer," and provided that Continental would recognize ALPA, instead of CAL Chapter, as the collective bargaining representative of the turbo-jet flight engineers, that the rates of pay, rules, and working conditions for that flight engineer job would be established under the ALPA agreement, and that personnel assigned to that flight engineer job would be assigned from the ALPA seniority list, instead of from the seniority list established under the CAL Chapter agreement. (R. 6-7, 34-36.)

CAL Chapter was not a party to, or advised of, the negotiations between Continental and ALPA which produced that agreement of May 29, 1959, and it was not consulted with respect to that agreement, despite the fact that said agreement covered matters with respect to which CAL Chapter was the exclusive bargaining representative. (R. 6-7, 36.) Nor was there any proceeding instituted by ALPA under the Railway Labor Act to determine whether any flight engineers in the employ of Continental desired a change in their bargaining representative. (R. 33.)

In the months that followed, Continental embarked upon a course of conduct designed to implement this agreement and to remove CAL Chapter as the representative of the flight engineers assigned to turbo-jet aircraft. This course of conduct included: (1) An attempt to solicit the individ-

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[3] Continental began its operation of turbo-jet aircraft on June 1, 1959. (R. 95.) Its then-existing collective bargaining agreement with CAL Chapter specifically covered flight engineers assigned to such aircraft. (R. 5, 209-210, 281-282, 326-328.)

ual flight engineers in order to persuade them to place their names on the ALPA seniority list and to agree that the flight engineers assigned to turbo-jets would be covered by the ALPA agreement. (R. 7-8, 37-38); (2) An attempt to negotiate a new agreement with CAL Chapter which would eliminate all of the existing references to turbo-jet flight engineers and would no longer be applicable to such personnel. (R. 8, 38-39); (3) A flat refusal to continue to recognize and bargain with CAL Chapter with respect to any matters affecting flight engineers assigned to turbo-jet aircraft, giving as its reason the fact that "The Company has a valid contract dated May 29, 1959, with the pilots which it must honor." (R. 8-9, 39, 42-49, 285); (4) The announcement of a "lockout" ultimatum to the effect that beginning on May 28, 1960, flight engineers would not be permitted to continue to work on turbo-jet aircraft unless they agreed to be placed on the ALPA seniority list and to be represented by ALPA instead of CAL Chapter. (R. 9-10, 214); and (5) The execution of further amendments to the agreement with ALPA—again without any consultation with CAL Chapter—providing, *inter alia*, for pay increases for those flight engineers who yielded to the ultimatum and elected to work as turbo-jet engineers under the ALPA agreement. (R. 87, 101, 215-216.)

The instant suit was instituted in the United States District Court for the Southern District of California on June 1, 1960. (R. 15.) In this suit CAL Chapter seeks a declaration that the agreement of May 29, 1959 was in violation of the Railway Labor Act insofar as it had the intent and subsequent effect of depriving flight engineers in the employ of Continental of their right to select their own collective bargaining representative, and of causing Continental to refuse to bargain with CAL Chapter for all of the craft or class represented by that Union. It seeks to enjoin ALPA and Continental from implementing that agreement which culminated in the lockout of the flight engineers on May 28, 1960, and from entering into similar agreements in the future which likewise recognize ALPA instead of CAL

Chapter as the exclusive representative of flight engineers. It seeks an order compelling Continental to restore the flight engineers to their positions, to resume recognition of CAL Chapter for all of its flight engineers, and to bargain collectively with CAL Chapter with respect to all of its flight engineers. (R. 12-15.)

On July 13, 1960, the District Court denied the motion of CAL Chapter for a preliminary injunction on grounds (R. 299-305) that are not germaine to the instant petition since they were not relied upon by the Court below.

In due course, CAL Chapter filed an appeal in the Court below. Meanwhile, beginning on or about June 30, 1960 the flight engineers in the employ of Continental struck in protest against the aforementioned lockout and against the unlawful refusal of Continental to continue to deal with CAL Chapter as the exclusive bargaining representative of its flight engineers.[4] During the course of the strike Continental advised CAL Chapter that the employment status of all the strikers had been terminated and that, as a result, Continental would no longer recognize CAL Chapter as the representative of any of its employees. CAL Chapter replied refusing to recognize the validity of the discharges or of the refusal to deal with the Union representing the striking flight engineers.

However, on or about October 10, 1960, while the appeal in the instant case was pending in the Court below, Continental, with the aid of ALPA, took the final step in its campaign to destroy CAL Chapter. Continental entered into an agreement with ALPA and some of the *individual striking flight engineers*[5]—an agreement to which CAL Chapter is *not* a party—terminating the strike on certain conditions including the condition that the CAL Chapter would be dissolved, and replaced by ALPA as the bargain-

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[4] The pertinent facts concerning the events following the strike of June 30, 1960 which are summarized above are set forth in the affidavit of Glenn B. Iverson attached to the "Opposition of Appellant To Motions of Appellees To Dismiss Appeal" which is on file with the Clerk of this Court.

[5] As the Court below correctly observed, "Whether it was signed by all of them is in dispute." (See *infra* Appendix A, p. 25.)

ing representative, and the condition that the strikers would select one of three "options" each of which involved an *individual* agreement either to return to work and receive certain guarantees which could involve as much as $20,000 in a lump sum payment, or not return to work and receive "severance pay" of $10,000.[6] Steps were taken by certain of the members of CAL Chapter who favored this proposal with a view to dissolving the CAL Chapter; but petitioner has maintained, and continues to maintain, that: (1) the attempted dissolution was invalid, and (2) a valid trusteeship over its CAL Chapter was established by the Flight Engineers' International Association for the purpose, *inter alia*, of continuing the prosecution of this suit and thereby vindicating the rights under the Railway Labor Act which the conduct of Continental and ALPA have destroyed.[7] Faced with no reasonable alternative, the individual strikers each succumbed to the monetary lure and signed one or another the options. Obviously, however, none of them had the authority by his individual agreement to waive the statutory right of CAL Chapter to insist that Continental bargain with CAL Chapter and refrain from conduct designed to force ALPA upon the flight engineers.

After the occurrence of the facts just mentioned, respondents moved in the Court below to dismiss the appeal for mootness, on the assertions that: (1) CAL Chapter is no longer in existence, (2) the dispute involved in the lawsuit

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[6] A copy of this agreement appears as Exhibit 5 to the affidavit of Roy A. Berry attached to the "Motion To Dismiss By Appellee Air Line Pilots Association, International, AFL-CIO" in the Court below which is on file with the Clerk of this Court.

[7] In its opinion the Court below considers and rules upon the question of whether the dissolution of the CAL Chapter was effective and proper and the question of whether the trusteeship was timely and lawful. For the reasons discussed below in this petition, it is not necessary for this Court to resolve those questions, and this petition does not seek to place in issue the merits of the decision of the Court below on those questions. The ultimate decision of the Court below dismissing the appeal as moot cannot be sustained even if it be assumed, *arguendo*, that CAL Chapter was dissolved in accordance with proper procedure and all necessary votes under the union's by-laws, and even if no trusteeship had thereafter been established.

has been settled, and (3) CAL Chapter represents no present employees of Continental and any former employees it purports to represent have accepted termination pay and are now estopped to claim a right of employment.

The Court below dismissed the appeal, and remanded the case with instructions to dismiss the case. It found that the case is moot because CAL Chapter has been dissolved and therefore "the sole plaintiff and appellant no longer exists." Without discussion, it also accepted the two additional reasons on the basis of which respondents had urged mootness, namely that the dispute has been settled, and that CAL Chapter no longer is a majority representative of any Continental employees. (Appendix A, *infra*, p. 30.)

It is from this decision that petitioner appeals to this Court.

REASONS FOR GRANTING THE WRIT

Several of the reasons for which this Court will normally grant review of decisions of U. S. Courts of Appeals combine to justify granting the writ sought in the instant case. The issue is of major importance in the administration of the Railway Labor Act; and the decision of the Court below is contrary to precedent established by this Court, and in conflict with decisions by other U. S. Courts of Appeals.

Consider the nature of this case in its essential outline: At a time when CAL Chapter is the duly designated and recognized majority representative of all of the flight engineers in the employ of Continental, a carrier subject to the Railway Labor Act, Continental embarks upon a program, the necessary and intended effect of which is to supplant CAL Chapter as the bargaining representative of a part of the craft or class it has theretofore represented, and to compel the employees involved to accept representation by ALPA. To achieve that end, Continental deals with ALPA on matters with respect to which it is required to deal with CAL Chapter, engages in individual bargaining with flight engineers in an effort to persuade them to

go along with the arrangement Continental has made with ALPA, refuses to continue to recognize and negotiate with CAL Chapter on matters with respect to which CAL Chapter is the only authorized reprensentative, locks out those flight engineers who refuse to accept Continental's ultimatum to accept ALPA representation and the ALPA contract or get out, and grants wage increases to those who do accept this ultimatum. CAL Chapter brings suit in a federal Court seeking to restrain and set aside this conduct, charging—with such obvious justification—that this conduct is in violation of the Railway Labor Act. But, before any court can determine the merits of this charge, Continental succeeds—again by negotiating with individual flight engineers in derogation of the rights of CAL Chapter and of those it represented—in getting some of the flight engineers individually to renounce CAL Chapter, to agree to terminate the litigation, and to take steps in an effort to dissolve that union. Believing that it has now successfully completed the process of destroying CAL Chapter, Continental and its co-conspirator ALPA, then urge that the litigation initiated by CAL Chapter has been rendered moot because, as Continental and ALPA claim, CAL Chapter no longer represents anyone, indeed no longer exists, and the dispute has been settled. The Court below accepts this contention concerning itself only with the irrelevant issues of whether in fact CAL Chapter was dissolved in accordance with the by-laws of the Union, and whether any entity survived to prosecute its suit, and ignoring completely the relevant issue of whether, assuming CAL Chapter was dissolved, the dissolution is attributable to conduct of Continental in violation of the Railway Labor Act, and the related relevant issue of whether, in any event, it is necessary that the suit be held to survive the alleged dissolution in order to remedy the unlawful conduct committed and complained of before the alleged dissolution occurred.

Sections 2, Third, 2, Fourth, and 2, Ninth of the Railway Labor Act (App. B, *infra*, pp. 32, 33) grants to the employees of a carrier subject to the Act the right to select their rep-

resentatives for collective bargaining without interference or coercion by the carrier, and imposes upon the carrier the duty to refrain from individual bargaining and to bargain exclusively with the labor organization freely selected by the employees in a particular craft or class. In *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 548 (1937), this Court interpreted the relevant sections of the Act in these terms:

> "The obligation imposed on the employer by section 2, Ninth (45 U.S.C.A. § 152, subd. 9), to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the act, and of the provisions of section 2, Third and Fourth (45 U.S.C. A. § 152, subs. 3, 4), giving the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other."

The specific conduct of engaging in bargaining with the individual employees at a time when they have designated a collective bargaining representative—conduct which is at the heart of the process by which Continental attempted to destroy CAL Chapter—was declared unlawful under the Railway Labor Act in *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342 (1944). In reaching the conclusion that individual bargaining is the very antithesis of the kind of collective bargaining the Act commands, this Court specifically cited and relied upon its decision in *J. I. Case Company* v. *N. L. R. B.*, 321 U.S. 332 (1944), where the same conclusion was found applicable to the National Labor Relations Act, 29 U.S.C. § 141 et seq. In that case this Court said:

> "Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, *nor to exclude the contracting employee from a duly ascer-*

> *tained bargaining unit;* nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement." (321 U.S. at 337 [Emphasis added].)
>
> See also: *Steele* v. *Louisville & Nashville R. R.*, 321 U.S. 192, 200 (1944).

There can be no doubt that the kind of conduct of which Continental is charged in this suit—i.e., the refusal to continue to recognize the majority representative of the flight engineers, the attempt to coerce the flight engineers into changing representatives, and the individual negotiation with flight engineers—is clearly proscribed by the Railway Labor Act. Moreover, this Court has made it plain that it is within the power of the federal courts, in a suit such as the instant one, to enforce by appropriate decree these mandates and prohibitions of the Act. That is the central lesson of *Texas & N. O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930), and *Virginian Ry.* v. *System Federation, supra.* In the latter case this Court said:

> "There is no want of capacity in the court to direct complete performance of the entire obligation; both the negative duties not to maintain a company union and not to negotiate with any representative of the employees other than respondent and the affirmative duty to treat with respondent." (300 U.S. at 550.)

What is more—and we now touch directly on considerations pertinent to the issue of mootness—this Court has pointed out that in the enforcement of the obligations of a carrier under the Railway Labor Act the federal courts are dealing *with the public interest* and not with private rights, and that as a consequence the tests of when a court will or will not grant relief must be different from what obtains when the enforcement of private rights are involved. Thus in *Virginian Ry.* v. *System Federation, supra*, this Court said:

> "More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor contro-

versies, especially where they may seriously impair the ability of an interstate rail carrier to perform its services to the public, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge. *Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.*" (300 U.S. at 552 [Emphasis added].)

When a federal court enforces, by an equitable decree, the obligations and proscriptions of the Railway Labor Act, it acts in the same capacity as the National Labor Relations Board under the National Labor Relations Act. As to the public interest involved, and in particular as to the fact that such public interest supersedes even the desire of the individual employees to waive their rights, this Court has said in *National Licorice Company* v. *N. L. R. B.*, 309 U.S. 350 (1940), in words that are particularly cogent here:

> "The Board Acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the 'exercise by workers of full freedom of association, self organization, and designation of representatives of *their own choosing for the purpose of* negotiating the terms and conditions of their employment * * *' § 1. The immediate object of the proceeding is to prevent unfair labor practices which, as defined by § 7, 8 are practices tending to thwart the declared policy of the Act."
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> * * * * * *
>
> "Here the right asserted by the Board is not one arising upon or derived from the contracts between petitioner and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of unfair labor practices by the employer in the future, *but to the prevention of his enjoyment of any advantage which*

> *he has gained by violation of the Act*, whether it be a company union *or an unlawful contract with employees* as the means of defeating the statutory policy and purpose. *Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes or by insisting, more than in a private litigation, that the employer's obedience to the Act cannot be compelled in the absence of the workers who have thus renounced their rights.*" (309 U.S. at 362-364 [Emphasis added].)

The instant suit, therefore, was brought to vindicate the public interest, embodied in the Railway Labor Act, in promoting collective bargaining, and in preventing carriers from interfering in the free choice of representatives of their employees for collective bargaining. As in *National Licorice*, the suit was aimed at preventing the violations from continuing and at preventing Continental from the "enjoyment of any advantage which [it] has gained by violation of the Act." The Court below wholly ignored the public interest aspect of this litigation in ruling that the suit had become moot as a result of the unlawful agreements between Continental and the individual flight engineers.

Yet, this Court has, on more than one occasion, ruled that litigation which involves a matter of the public interest must be permitted to survive developments during the course of the litigation which would have resulted in rendering moot a case where only private rights are involved. In the leading case of *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897), this Court enunciated that rule in these terms:

> "Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained, or while the case is on appeal, and in any such case the Court being informed of the facts will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public the enforcement of which the Government

> has endeavored to procure by the judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose these rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the Act of Congress, by any such action as has been taken in this case."[8]

See also: *Southern Pacific Terminal Company* v. *I. C. C.*, 219 U.S. 498 (1911).

In *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671 (1944), this Court dealt with the contention that an appeal in a suit to restrain alleged violations of the Fair Labor Standards Act had become moot because the corporate defendant had been dissolved. This Court rejected the mootness contention, stating that "In the present posture of the case we think it plain that the moving papers fail to establish that the case is moot or has abated merely because of the dissolution of the corporate defendant." (321 U.S. 671 at 673.) This Court cited the *Trans-Missouri* and *Southern Pacific* decision, *supra*, and after referring to numerous decisions in which litigation has been held to survive the dissolution of a corporate defendant, this Court said:

> "And these principles may be applied in fuller measure in furtherance of the public interest, which here the petitioner represents, than if only private interests were involved. See *Virginian R. Co.* v. *System Federation*, 300 U.S. 515, 552, 57 S. Ct. 592, 601, 81 L. Ed. 789, and cases cited."

See also: *Labor Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 271 (1938). *Fishgold* v. *Sullivan Dry Dock & Repairs Corp.*, 328 U.S. 725 (1946).

We submit, therefore, that the decision of the Court below, in declaring the instant litigation moot, ignored the indisputable fact that the suit involves matters of public,

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[8] Suppose that instead of bringing a civil suit, CAL Chapter had elected to file criminal charges under Section 2, Tenth of the Act, and a U. S. Attorney had instituted criminal proceedings. Under the authority of the *Trans-Missouri* decision it can hardly be doubted that such proceedings would *not* have been ruled moot on the facts of this case. No different result can obtain here, for, as shown above, the same public rights are involved here.

and not private, interest which must be resolved irrespective of what has happened to the union plaintiff. In that respect, if in no other, the decision below conflicts with the decisions of this Court and must be reversed.

But, important as it is, this general principle is by no means the sole consideration which justifies review by this Court of the decision below. There is an even more direct and specific respect in which the decision below cannot be squared with the rulings of this Court and of other federal courts.

Ever since the time when Congress first established, in the Railway Labor Act and in the National Labor Relations Act, the employer's obligation to bargain collectively—an obligation enforceable through administrative and/or judicial proceedings—this question has presented itself: Suppose that after an employer has refused to bargain, a majority of the employees renounce the Union, will this loss of majority support by the Union render it unnecessary or improper to issue an order compelling collective bargaining, or render proceedings to obtain such an order moot? There is no question but that this Court has answered that question in the negative, particularly where—as in the instant case—the loss of majority can be attributed to the employer's unlawful conduct.

One of the early cases in which this problem arose was *Texas & N. O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks, supra.* There this Court enforced a district court order compelling the carrier to bargain with the duly designated union despite the fact that while the proceedings were pending the carrier had succeeded in coercing a majority of the employees to withdraw from that union and to select another union as their representative.

The most definitive statement of the views of this Court on that question appear in *Medo Photo Supply Co.* v. *N. L. R. B.*, 321 U.S. 678 (1944), where the employer sought to avoid the sanctions imposed by the Board against his refusal to bargain on the ground: (1) that the complaining union no longer had the support of a majority of the em-

ployees involved, and (2) that unfair labor practices were condoned by the employees themselves. This Court rejected those contentions in these terms:

> "Petitioner was not relieved from its obligations because the employees asked that they be disregarded. The statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer, even though the employees consent, • • • or the employees suggest the conduct found to be an unfair labor practice • • • at least where the employer is in a position to secure any advantage from these practices, • • •.
>
> "Petitioner cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will. • • • Petitioner's refusal to bargain under those circumstances was but an aggrevation of its unfair labor practice in destroying the majority's support of the union, and was a violation of § 8 (1) and (5) of the Act." (Citations omitted.) 321, U.S. at 687.

In *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U.S. 318 (1940), this Court was likewise confronted with the claim of an employer that no order to bargain should issue because there had been a defection of members from the charging union. In terms directly applicable here, this Court said:

> "Respondent has contended before the Board, as here, that if the T. W. O. C. did actually represent a majority of its employees on April 4 (as the Board found), a shift in membership had given the Federation a majority when the company on April 9 recognized it as exclusive bargaining representative. However, the Board found that 'the record is clear that, had it not been for the unfair labor practices of the respondent in organizing and fostering the Federation and in persuading, intimidating and coercing

its employees to join the Federation and leave the T. W. O. C., the respondent's employees would have remained members of the T. W. O. C.' In view of the substantial support in the evidence for the Board's findings that the company intimidated and coerced its employees and dominated the Federation, the Board properly concluded that 'The unfair labor practices of the respondent cannot operate to change the bargaining representative previously selected by the untrammelled will of the majority'." (Footnote omitted.) 310 U.S. at 339-340.

See also: *National Licorice Co.* v. *N. L. R. B., supra. Franks Bros. Co.* v. *N. L. R. B.*, 321 U.S. 702 (1944). *International Assn. of Machinists* v. *N. L. R. B.*, 311 U.S. 72 (1940). *N. L. R. B.* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563. (1950)

The Courts of Appeals and the National Labor Relations Board have uniformly followed the principle that an order remedying unfair labor practices proscribed by the Act may not be denied because of the claim that the charging union no longer represents the employees in question. See, e.g.:

Semi-Steel Casting Co. v. *N.L.R.B.*, 160 F (2d) 388. (CA8, 1947). *N.L.R.B.* v. *Swift & Co.*, 162 F (2d) 575 (CA3, 1947). *N.L.R.B.* v. *Norfolk Shipbuilding Co.*, 172 F (2d) 813 (CA4, 1949). *N.L.R.B.* v. *Tower Hosiery Mills*, 180 F (2d) 701 (CA4, 1950). *West Texas Utilities Co.* v. *N.L.R.B.*, 184 F (2d) 233, (CA DC, 1950). *N.L.R.B.* v. *Lambert et al.*, 211 F (2d) 91, (CA5, 1954). *N.L.R.B.* v. *Philamon Laboratories, Inc.*,—F (2d)—, 49 LRRM 2624, (CA2, 1962). *Kohler Co.*, 128 NLRB 1062. *Automotive Supply Co., Inc.*, 119 NLRB 1074.

Surprisingly, the Court below has itself in the past recognized and adhered to this principle. In *N. L. R. B.* v. *Idaho Egg Producers, Inc.*, 229 F (2d) 821 (CA9 1956), the Court stated:

"Moreover an employer may not set up as a justification for its refusal to bargain with a union the defection of union members which if had itself induced by unfair labor practices, even though the

consequence is that the union no longer has the support of a majority. In such circumstances the employer will be required to bargain notwithstanding the union does not presently have a majority. *N. L. R. B.* v. *Parma Water Lifter Co.*, 9 Cir., 211 F (2d) 258." (229 F (2d) 821, at 823.)

The decision of the Court below cannot be reconciled with the rulings of this Court and the other authorities cited above. That decision permits a carrier to escape judicial consideration of the legality of a course of conduct aimed at destroying CAL Chapter on the ground that Continental succeeded in accomplishing the destruction before the Court had an opportunity to rule upon the charges. It is a conclusion that flies in the face of the authorities reviewed above, and that violates every sense of justice and equity.

It is true that in most cases where the question has arisen in the past, the defection from the union on which the employer sought to rely to escape an order compelling bargaining took the form of a loss of majority—the members renouncing their adherence to the charging union, or joining another union. Rarely have the reported cases on this question involved a situation in which the charging union went out of existence. Obviously, however, if anything, such a case, *a fortiori*, requires the same result as in the cases reviewed above. And in the two reported cases where such a factual situation is revealed that is precisely the result that was reached. In *Tennessee Valley Broadcasting Company*, 83 N.L.R.B. 895, the charging union was disbanded before the Board could rule on the charge of an unlawful refusal to bargain. The Board, in issuing an order to bargain, said:

> "Nor is the fact that the Union has ceased to exist any impediment to the issuance of an order requiring the Respondent to bargain with the Union on request. Under the circumstances of this case, the disintegration of the Union must be attributed to the Respondent's own unfair labor practices, especially to its persistent refusal to recognize the Union's existence or to bargain with it. It would not effectuate the

policies of the Act to permit the respondent to take advantage of its own illegal acts.[11] "

[11] See *N. L. R. B.* v. *Blanton Co.*, 121 F (2d) 564 (C.A. 8); see also *Franks Bros. Co.* v. *N. L. R. B.*, 321 U.S. 702; *N. L. R. B.* v. *P. Lorillard Co.*; 314 *U.S.* 512; *N. L. R. B.* v. *Bradford Dyeing Assn.*, 310 U.S. 318." (83 N.L.R.B. 895 at 899.)

N. L. R. B. v. *Blanton Co.*, 121 F (2d) 564 (CA 8, 1941), likewise involved a claim that the charging union was no longer in existence. After considering the question of whether the claimed non-existence was founded in fact, the Court said:

> "But, even more than all this, the record seems to us clearly to justify the finding that the dazed condition of the union had been occasioned by the persistent undermining efforts of the employer, as we shall discuss later. Any change in its status from such a cause was not one to which the Board was required to give recognition in favor of respondent. • • • We hold that the Board could properly find that the union was such an existent labor organization as to entitle it to file charges under the Act." (121 F (2d) 564 at 569. (Citations omitted.)

In the instant case, the alleged dissolution of the CAL Chapter may not only be attributed to Continental's refusal to bargain with it and Continental's insistence on dealing with ALPA, but also, and even more immediately, to the contracts with the individual flight engineers which Continental obtained at the termination of the strike. Such conduct, as we have seen above, is itself violative of the Railway Labor Act. To hold that by that process Continental succeeded in making this suit moot is unconscionable and in conflict with all of the precedents discussed above.

For the reasons already discussed, the decision of the Court below must fall, irrespective of whether it is wrong or right on the question of whether a legally effective dissolution of CAL Chapter was accomplished. Some brief comment on the Court's findings on that question is in order, however, because those findings themselves emphasize by

how far the Court below missed the central issue in the case, and ignored the applicable precedents of this Court.

The conclusion of the Court below that the dissolution was validly accomplished rests itself only on the minutes of a meeting as to which the Court below said pointedly "disputed questions of fact concerning that meeting are presented which *cannot be determined* on the record before us" (Appendix A, *infra*, p. 24.) [Emphasis supplied.] The Court seeks to set at rest these disputed questions of fact by finding that any initial invalidity was cured by "unanimous ratification" of dissolution by acceptance of certain options in accordance with the settlement agreement, despite the fact that the Court earlier found "whether it was actually signed by all of them is in dispute." (Appendix A, *infra*, p. 25.) Most startling is the citation of *Harker* v. *McKissock*, N.J. Sup. Ct., 81 A (2d) 480, in support of the principle of ratification. That case, indeed, stands squarely opposed to the principle here enunciated. As is apparent from the more comprehensive factual statement in the opinion of the lower court in that case, ratification was accomplished formally at a meeting announced and held for the stated purpose, "to discuss and by appropriate action to reaffirm the disaffiliation." 62 A (2d) 405, 27 LRRM 2040. That court relied, properly, on the principle that an *assembly* may ratify any action which it has the power to authorize in advance, in which case the ratification relates back to the date of the action ratified. In direct contrast stand the facts of the case at bar, in which the only possible source of ratification is not the assembly at all—but rather, the individual flight engineers with whom the employer dealt individually in direct violation of the letter and spirit of the Railway Labor Act.

Thus, in every respect, the Court below missed the mark completely. The Railway Labor Act requires collective bargaining, prohibits direct dealing with individual employees, and insists that employees be free from employer interference in their selection of bargaining representatives. A suit in a federal court seeking to enjoin violations

of the Act involving a refusal to bargain, individual bargaining and coercion by an employer in the employees' selection of a union cannot be deemed moot when the employer succeeds—through further violations—in destroying the union completely. Such a result makes meaningless the precedents of this Court reviewed above; it involves a question of singular importance in the administration of the Act and it cannot be permitted to stand.

CONCLUSION

For all of the reasons stated above, petitioner respectfully submits that a writ of certiorari should issue to review the decision of the Court below in this cause.

Respectfully submitted,

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MARCH 27, 1962.

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 17,071—Oct. 23, 1961

FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, AFL-CIO, CAL CHAPTER, AN UNINCORPORATED ASSOCIATION, APPELLANT,

vs.

CONTINENTAL AIR LINES, INC., A NEVADA CORPORATION; AND THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO, AN UNINCORPORATED ASSOCIATION, APPELLEES.

Appeal from the United States District Court for the Southern District of California, Central Division

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Before: HAMLEY, JERTBERG and MERRILL, *Circuit Judges.*

HAMLEY, *Circuit Judge:* In this action Flight Engineers International Association, AFL-CIO, CAL Chapter, (CAL Chapter) sought a declaratory judgment and injunctive relief against Continental Air Lines, Inc., (Continental) and The Air Line Pilots Association, International, AFL-CIO, (ALPA).[1] The action arose under the Railway Labor Act, 45 U.S.C.A. § 151 *et seq.*, and the district court had jurisdiction under 28 U.S.C.A. §§ 1331, 1337.

Plaintiff sought a judgment declaring that a contract entered into between Continental and ALPA on May 29, 1959, is void and unenforceable to the extent that it purports to apply to rates of pay, rules or working conditions of persons performing the duties of flight engineers, however described. It sought a preliminary and permanent injunction enjoining defendants from giving effect to the

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1 The letters "CAL" in the name of plaintiff are used to indicate "Continental Air Lines."

May 29, 1959 contract, or any renewal, modification or extension thereof, or any similar agreement, so as to affect the rates of pay, rules, working conditions, job assignments, seniority or other conditions of employment of persons performing the flight engineering function employed or to be employed by Continental.[2]

The suit was filed on June 1, 1960. On the following day plaintiff moved for a preliminary injunction in accordance with the prayer of its complaint. A district court hearing was held thereon on June 14, 1960, at which time affidavits and briefs were received and oral argument was had, no evidence being offered. An order, supported by findings of fact and conclusions of law, was entered on July 11, 1960, denying the motion for a preliminary injunction. Plaintiff appeals. We have jurisdiction under 28 U.S.C.A. § 1292 (a)(1).

On June 21, 1961, while the appeal was pending in this court and prior to oral argument therein, Continental moved for dismissal of the appeal for mootness. A similar motion was filed on the same day by ALPA. The motions were opposed by appellant and we heard oral argument thereon at the same time that the appeal was argued on the merits.

Several grounds are advanced by Continental and ALPA why the appeal and the case should be dismissed as moot.

[2] The injunction sought would also (1) restrain any change in the manner of assigning persons to perform the duties of flight engineers as such assignments were made prior to May 29, 1960, except changes made as a result of collective bargaining between Continental and CAL Chapter; (2) restrain interference with any of the employees of Continental in the designation of a collective bargaining agent; (3) restrain defendants from dealing with each other as representatives of flight engineers however described; (4) restrain Continental from refusing to recognize CAL Chapter as the exclusive bargaining representative of persons performing duties of flight engineers; (5) restrain defendants from putting into effect any change in rates of pay, rules or working conditions of employees performing duties of flight engineers unless and until Continental should give the written notice and observe other conditions contained in § 6 of the Railway Labor Act, 45 U.S.C.A. § 156; (6) require Continental to restore to their jobs without loss of seniority or other rights all flight engineers employed by Continental on May 29, 1960; and (7) require Continental to recognize and deal with CAL Chapter as the exclusive representative of all persons employed by the company who were performing the function of flight engineer; however described.

Among these are the following: (1) CAL Chapter, the sole plaintiff and appellant, is no longer in existence; (2) the dispute involved in the lawsuit has been settled; and (3) CAL Chapter represents no present employees of Continental and any former employees whom it purports to represent have accepted termination pay and are now estopped to claim a right of employment.

Pertinent to these grounds for dismissal the affidavits of record establish facts which we now summarize. At the time the suit was commenced on June 1, 1960, CAL Chapter, the sole plaintiff and appellant, was an unincorporated association functioning as a labor organization. As an affiliated local chapter of Flight Engineers International Association, AFL-CIO (International), it then represented flight engineers employed by Continental. At that time, however, there was no collective bargaining agreement in effect between CAL Chapter and Continental. The agreement between them had expired on May 1, 1960, when the parties were unable to agree upon cross-proposals for changes therein as proposed in their respective reopening notices served in accordance with 45 U.S.C.A. § 156.

On June 30, 1960, while this case was pending in the district court, CAL Chapter called and commenced a strike against Continental. Twenty-two of the flight engineers employed by Continental, constituting what is conceded to be the complete membership of CAL Chapter, participated in the strike. All twenty-two of the strikers were replaced by Continental, their employment with Continental being thereby terminated. In view of these circumstances Continental on August 27, 1960, notified CAL Chapter that it no longer recognized that union as the bargaining agent for any of Continental's employees.

While the strike was in progress several of the striking flight engineers entered into negotiations with representatives of ALPA regarding ways and means of ending the strike and merging the flight engineers into ALPA, which union would then represent all Continental flight deck crew members.

A tentative agreement was formulated after which a meeting of CAL Chapter was held on October 7, 1960. After accepting the resignation of G. B. Iverson as president of the organization, the meeting adjourned to a later hour the same day, such adjourned meeting to be held at a different place. At the reconvened meeting a motion was made that CAL Chapter be dissolved in accordance with article I, section V, of its constitution and by-laws, and that all strike activities be ended and the flight engineers be merged with ALPA. According to the minutes of the meeting, the motion carried by a vote of fifteen for and one abstaining.

Article I, section V, of the constitution of CAL Chapter provided that a two-thirds majority of the active members was required for dissolution. There being twenty-two such members, fifteen votes were required to dissolve. One of these fifteen votes, however, was that of M. L. Kenyon which was voted by a proxy given to F. L. San Juan.

CAL Chapter contends that this proxy was illegally voted for the reason that Kenyon had not given San Juan his proxy for the purpose of voting for dissolution of the chapter. CAL Chapter also contends that the vote to dissolve was invalid for the additional reason that notice was not given of the meeting at which such vote was had. Continental and ALPA have submitted counter affidavits as to each of these matters, but disputed questions of fact concerning that meeting are presented which cannot be determined on the record before us.

By the same vote as on the motion for dissolution a motion was passed directing the acting president to notify International, National Mediation Board, ALPA, Continental, legal firms retained on behalf of CAL Chapter both past and present, and other interested parties, of the dissolution of CAL Chapter and the other action described above. Under this motion all parties so notified were to be "relieved and/or directed to terminate all efforts or actions relative to CAL Chapter." A second reconvened meeting was held on the night of October 7, 1960, at which

a motion was carried directing the officers of CAL Chapter to act as trustees, as set forth in the constitution, "for the disposal of assets, payment of bills, etc." This motion was carried unanimously, fourteen members being present in person and one by proxy.

In accordance with the action taken at the first reconvened meeting of October 7, 1960, notice was given on that day to the attorneys of CAL Chapter that all differences between it, Continental, and ALPA had been completely resolved and that the strike against Continental had been terminated. These attorneys were also instructed to enter into stipulations with counsel for Continental and ALPA to dismiss or otherwise dispose of all pending litigation, which would include the instant case. These attorneys, however, took no action to dismiss such litigation.

A strike settlement agreement based on the tentative agreement previously reached was prepared and executed by ALPA and some of the twenty-two striking flight engineers. Whether it was actually signed by all of them is in dispute. This agreement was then presented to and executed by Continental on October 10, 1960. Pursuant to this agreement, and between October 7 and 10, 1960, seven former flight engineers elected option (c) in section 1 of this agreement under which they elected not to return to work and were paid severance pay in the amount of $10,000 each. These payments were made and accepted. During the same period the remaining fifteen former flight engineers elected option (b) in section 1 of this agreement under which they were re-employed by Continental as pilots.[3] The

[3] While several of the striking flight engineers now deny that they signed the supplemental agreement or authorized anyone to sign for them, no one denies that he signed a (b) or (c) option. None of those who signed a (c) option and pursuant thereto received severance pay in the sum of $10,000 has indicated any desire to revoke his selection of that option or has made any offer of restitution. In the affidavit of former flight engineer Glenn B. Iverson, however, it is stated: "I do not consider it [the signed option (c)] binding upon me or dispositive of my rights against Continental. By signing option (c) I did not intend to waive my rights to reinstatement to my former position with Continental under terms and conditions of employment negotiated by the CAL Chapter. . . ."

latter returned to work about October 11, 1960, and have continued to work for the company since that time.

The "selection of option" form signed by all twenty-two contains the statement: "The undersigned being . . . a signator to the Supplemental Agreement between Continental Air Lines, Inc., and ALPA dated October 10, 1960. . . .". That supplemental agreement expressly recites that CAL Chapter has been dissolved and that they have terminated the strike and have taken steps to terminate all outstanding litigation between CAL Chapter and Continental.

ALPA and Continental subsequently entered into collective bargaining negotiations which resulted in a new collective bargaining agreement between them dated February 28, 1961. This agreement, which will remain in effect until August 31, 1962, covers all of Continental's flight deck crew members. The ALPA-Continental agreement of May 29, 1959, has expired and is no longer in effect.

In the meantime, on October 10, 1960, the Master Executive Committee of International announced the establishment of a trusteeship over CAL Chapter and notified all CAL Chapter members of this action. In this notice it was stated that the attempt to dissolve CAL Chapter, terminate the litigation against Continental, and to end the strike was in violation of the constitution and by-laws of CAL Chapter and International. International later notified all CAL Chapter members of a hearing in New York City on November 16, 1960, to be held on the question of the establishment of the trusteeship.

Prior to November 16, 1960, the constitution and by-laws of International contained no provision relating to the establishment of a trusteeship over a subordinate body thereof. On that date, however, the Master Executive Board of International amended the constitution of International by adding a new section 16 to article V thereof, providing in detail for the establishment of trusteeships under stated circumstances.

The hearing referred to above was held as scheduled, and on January 4, 1961, the hearing committee issued its

report approving the trusteeship and recommending that it be continued. The hearing committee also recommended that the trustees be instructed to continue to prosecute all pending litigation on behalf of CAL Chapter. Pursuant to the procedures set out in the newly-added constitutional provision respecting trusteeships the recommendations of the hearing committee were approved by the Master Executive Board on March 21, 1961.[4]

With these facts before us we turn to a consideration of the first ground advanced by appellees why this appeal and this case must be deemed moot. This ground is that plaintiff and appellant, CAL Chapter, is no longer in existence. If this is true the appeal and case is necessarily moot, since there would no longer be a "case or controversy" within the meaning of Article III, Section 2 of the Constitution. Federal courts have jurisdiction only where a case or controversy is involved. *Muskrat* v. *United States*, 219 U.S. 346, 356.

According to the minutes of the meeting of CAL Chapter held on October 7, 1960, that chapter was dissolved at that time by the requisite number of votes of the members. The minutes also indicate that a motion was passed by the same vote directing that International be advised of the dissolution. It is undisputed that such notice was given on that date.

The facts just recited establish that CAL Chapter was dissolved on that day unless other facts are properly before us which establish that such dissolution was invalid or ineffective. Facts which assertedly demonstrate the invalidity or ineffectiveness of that dissolution are presented by CAL Chapter acting through trustees appointed under a trusteeship established by International.

But appellees Continental and ALPA contend that the purported trusteeship was not validly established, and since International is not a separate party and has no interest

[4] The trustees of CAL Chapter filed reports with the Commissioner of the Bureau of Labor-Management Reports of the United States Department of Labor, concerning the establishment of the trusteeship on October 10, 1960. On May 9, 1961, the trustees filed a semiannual report with the commissioner.

in this case except as trustee, no question as to the invalidity of the dissolution is properly before us. Appellees point to 29 U.S.C.A. § 462 which provides that trusteeships shall be established and administered by a labor organization over a subordinate body "only in accordance with the constitution and by-laws of the organization which has assumed trusteeship. . . ." Appellees call attention to the fact, conceded by CAL Chapter, that on October 7, 1960, when CAL chapter voted to dissolve, and on October 10, 1960, when International purported to establish a trusteeship, the constitution and by-laws of International contained no provision relating to trusteeships.

CAL Chapter meets this argument by contending that International had the "inherent" right to establish a trusteeship because the attempted dissolution threatened the "natural right of self-preservation" of International. CAL Chapter also argues that, authorized by the amendment to International's constitution made on November 16, 1960, whereby trusteeships were provided for, the Master Executive Board at a later date ratified and continued the trusteeship initially based on inherent right.

Whatever "inherent" power an international union formerly may have had to impose a trusteeship where the international constitution or by-laws made no provision therefor, it has had no such power since the enactment of the Labor-Management Act of 1959, Public Law 86-257; 73 Stat. 531. Section 302 thereof, 29 U.S.C.A. § 462 expressly provides that such trusteeships shall be established and maintained "only in accordance with the constitution and by-laws of the organization which has assumed trusteeship. . . ."

If confirmation is needed of the specific limitation thus intended to be placed upon internationals, it is sufficient to refer to Senate Report No. 187 to accompany S. 1555, which became the Labor-Management Act of 1959. The committee therein stated that it concurred in the select committee's recommendation that there should be a "limitation on the right of internationals to place local unions in trusteeship."

2 U.S. Code Cong. and Ad. News, 86th Cong., 1st Sess., 1959, p. 2333.[5]

If it be assumed, however, that an international has such an "inherent" right notwithstanding section 462, that right could at most be exerted for the purpose of preventing the subordinate body from violating some obligation it had accepted by virtue of its relationship with the international. But on the record before us it is established that in dissolving on October 7, 1960, CAL Chapter violated no such obligation.

The only provision of International's constitution and by-laws concerning the dissolution of chapters is section 4 of article V which provides in part: "No chapter shall be disbanded or withdrawn by its own motion as long as the majority of the members in good standing favor its continuance. . . ." It is undisputed that at the meeting of CAL Chapter held on October 7, 1960, at least fourteen of a total chapter membership of twenty-two voted for dissolution, thus fully meeting the requirement of section 4 of article V of International's constitution.

It may be that CAL Chapter also obligated itself to International to dissolve only in the manner provided in the chapter's constitution and by-laws. In that event consideration should be given to CAL Chapter's contention that one less than the two-thirds vote required by the chapter constitution and by-laws voted for dissolution, and that notice of the meeting at which dissolution was voted was not given in the manner required by the chapter's constitution and by-laws.

But if there was any initial invalidity in this regard the same has been cured by the unanimous ratification of the dissolution evidenced by the acceptance, not later than Oc-

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[5] The Senate committee also said, in analyzing the trusteeship provisions of the act:

"Section 202 [later 302] of the bill sets up two standards for testing the legality of a trusteeship.

First, the trusteeship must 'conform to the constitution and bylaws of the labor organization. . . .'" (2 U.S. Code Cong. and Ad News, 86th Cong., 1st Sess., 1959, p. 2334)

tober 10, 1960, of one or the other of the options offered under the supplemental agreement of October 10, 1960. As before noted, these options contained the recital that the person signing his name is "a signator to the supplemental agreement. . . ." That supplemental agreement expressly recites that CAL Chapter has been dissolved. The described circumstances, considered together, constitute a unanimous ratification of the dissolution proceeding which in our view overcomes any possible question as to the validity of those proceedings. See *Harker* v. *McKissock*, N.J. Sup. Ct., 81 A. 2d 480, 485.

On November 16, 1960, the constitution of International was amended to permit trusteeships. But this newly-added provision was applicable only to chapters in existence on that date. As before noted, CAL Chapter had been dissolved not later than October 10, 1960.

We conclude that International, acting through its purported trusteeship of CAL Chapter, or otherwise, has no standing to question the validity of the dissolution of CAL Chapter. In view of that dissolution, the sole plaintiff and appellant no longer exists.

For the reasons stated, this appeal and case is now moot. We think it is also moot for the two additional reasons urged by appellees as set out earlier in this opinion.

The appeal is dismissed and the case is remanded with directions to dismiss the same.

(Endorsed) Opinion Filed Oct. 23, 1961.

FRANK H. SCHMID, *Clerk*.

The United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 17071—Judgment

FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, AFL-CIO, CAL CHAPTER, ETC., APPELLANT,

vs.

CONTINENTAL AIR LINES, INC., ET AL., APPELLEES.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and on motions of appellees to dismiss appeal here herein and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the motions to dismiss in this Cause be, and hereby are granted and that the appeal in this cause be and hereby is dismissed and that the cause is remanded to the said District Court with directions to dismiss the cause, with costs in this court in favor of the appellees and against the appellant.

It is further ordered and adjudged by this Court that the appellees recover against the appellant for their costs herein expended and have execution therefor.

Filed and entered October 23, 1961.

The United States Court of Appeals

FOR THE NINTH CIRCUIT

EXCERPT FROM PROCEEDINGS OF THURSDAY DECEMBER 7, 1961

Before: HAMLEY, JERTBERG and MERRILL, *Circuit Judges*.

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, it is ordered that the petition of appellant, filed December 4, 1961, and within time allowed therefor by rule of Court, for a rehearing of above cause be and hereby is denied.

APPENDIX B

Pertinent provisions of the Railway Labor Act referred to in the brief are as follows:

Section 2, Third:

> "Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Section 2, Fourth:

> "Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from per-

mitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2, Seventh:

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Section 2, Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have

power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Section 6:

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

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Supreme Court of the United States

OCTOBER TERM, 1961

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, CAL CHAPTER, *Petitioner*

v.

CONTINENTAL AIR LINES, INC. AND THE AIR LINE PILOTS ASSOCIATION INTERNATIONAL, AFL-CIO, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT CONTINENTAL AIR LINES, INC. IN OPPOSITION

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IN THE

Supreme Court of the United States

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No. 820

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v.

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Opinion Below

The opinion of the court of appeals (Pet. App. A, 21-30) is reported at 297 F.2d 397.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether the court below correctly held that a case becomes moot where a labor organization (petitioner CAL Chapter) brings suit for a declaratory judgment and injunctive relief, asserting violations of the Railway Labor

Act, against an airline employer (respondent Continental) and another labor organization (respondent ALPA), and, pending appeal from an order of the district court denying the preliminary injunction, (a) the striking members of CAL Chapter, during an economic strike, contact respondent ALPA and together formulate a tentative strike settlement agreement to be presented to Continental by ALPA on behalf of the strikers, (b) the strikers then dissolve CAL Chapter, (c) ALPA on behalf of the strikers concludes the strike settlement agreement with Continental, (d) under the settlement agreement fifteen of the strikers are reemployed as pilots and the remaining seven elect, are paid, and accept severance pay in the amount of $10,000 each, and (e) Continental does not violate the Railway Labor Act and the above described events are therefore not attributable to any violation of that Act by Continental.

Statute Involved

The pertinent provisions of the Railway Labor Act, as amended, are set forth in the petition (Pet. App. B, 32-34).

Statement

The facts asserted in the petition differ widely from the facts found and stated in the opinion of the court below.[1] Respondent Continental believes that the petitioner, CAL Chapter, is asking this court to grant certiorari to correct alleged errors in fact finding by the court below. It is therefore deemed advisable to set forth herein a full statement of the case and the real question presented to this Court in this case.

CAL Chapter seeks a review by this Court of the opinion and judgment of the court below dismissing the appeal and ordering dismissal of the case because it became moot pending appeal from the district court to the court of appeals (Pet. App. A, 21-31). The opinion and judgment were entered on motions to dismiss for mootness filed by Continental and ALPA in the court below. These motions were

[1] The findings of fact of the court below relate solely to the question of mootness. The court made its findings from the affidavits of record (Pet. App. A, 23) and carefully avoided making any finding with respect to disputed factual matters (Pet. App. A, 23, 24, 25).

supported by affidavits with documentary exhibits attached and memoranda of points and authorities. CAL Chapter opposed these motions by affidavits with attached exhibits and memoranda of points and authorities.[2] In ruling on the motions the court below stated its findings on factual matters as well as its legal conclusions (Pet. App. A, 21-30).

CAL Chapter, as sole plaintiff, filed this suit June 1, 1960, against Continental and ALPA, seeking a declaratory judgment and injunctive relief (R. 3-15; Pet. App. A, 21-22).[3] The district court denied CAL Chapter's motion for preliminary injunction by order entered July 11, 1960 (R. 299-305). CAL Chapter appealed that order to the Court of Appeals for the Ninth Circuit.

During the pendency of the appeal and on June 21, 1961, Continental and ALPA filed motions to dismiss the appeal and the case as moot (Pet. App. A, 22). Although several grounds were advanced for granting the motions, the grounds asserted included those upon which the court below granted the motions. These grounds are set forth in the opinion below as follows:

> "(1) CAL Chapter, the sole plaintiff and appellant, is no longer in existence; (2) the dispute involved in the lawsuit has been settled; and (3) CAL Chapter represents no present employees of Continental and any former employees whom it purports to represent have accepted termination pay and are now estopped to claim a right of employment." (Pet. App. A, 23)

CAL Chapter was recognized as the union representing flight engineers employed by Continental when this suit was filed; however there was no collective bargaining agreement then in effect, the prior agreement having expired May 1, 1960 (Pet. App. A, 23). In a prior case in which Continental and CAL Chapter were opposing parties, the district court held that Continental and CAL Chapter had bargained fully, that the processes of the Railway Labor Act had been ex-

[2]The motion papers, exhibits and affidavits of all parties below are part of the record certified to this Court.

[3]"R." refers to the Transcript of Record in the court of appeals.

hausted, that no further waiting periods were required under that Act, and that both parties were free to take economic action (R. 462-475; 299-305). CAL Chapter was free to strike and Continental was free to put into effect the changes it had proposed regarding the crew complement on its jet aircraft. The decision in the prior case was entered May 18, 1960, was and is final and was never appealed (R. 301-304). The record in the prior case is included in the certified record before this Court. The prior case will be referred to herein as case 518-60, its docket number in the district court (R. 311 et seq.).

Continental took economic action on or about May 28, 1960, implementing its proposed changes in the flight crew complement of its jet aircraft (R. 301). On June 30, 1960, CAL Chapter took its economic action in protest against these changes. On that date CAL Chapter called and commenced a strike of flight engineers against Continental (Pet. App. A, 23).

The complete membership of CAL Chapter, twenty-two flight engineers, participated in the strike (Pet. App. A, 23). During the course of the strike Continental kept operating and replaced the strikers (Pet. App. A, 23; see also affidavit of Bell supporting Continental's motion to dismiss below). They were not just fired outright as the petition seems to suggest (Pet. 5) but were replaced, as found by the court below (Pet. App. A, 23). Next, on August 27, 1960, Continental notified CAL Chapter and the National Mediation Board that it no longer recognized that union as the bargaining agent for any Continental employees (Pet. App. A, 23; Exhibit 2 to affidavit of Bell).

The strike continued and some of the strikers began negotiating with respondent ALPA, the union representing Continental's pilots (Pet. App. A, 23). The court below found:

> "While the strike was in progress several of the striking flight engineers entered into negotiations with representatives of ALPA regarding ways and means of ending the strike and merging the flight

engineers into ALPA, which union would then represent all Continental flight deck crew members." (Pet. App. A, 23)

The negotiations between the strikers and ALPA resulted in a tentative agreement; then the striking flight engineers dissolved CAL Chapter, the sole plaintiff herein (Pet. App. A, 24). There is some argument about one proxy vote at the union dissolution meeting (Pet. App. A, 24), but again as found by the court below, the undisputed facts are that 100% of the strikers signed option forms reciting that they were "signators" to the strike settlement agreement of October 10, 1960 (Pet. App. A, 24-26). That agreement confirmed the dissolution of CAL Chapter and all of the strikers accepted the benefits of that agreement, either returning to work as pilots or electing and accepting $10,000 severance pay (Pet. App. A, 26). Those who elected severance play did so on the advice of the CAL Chapter attorneys (affidavit of Iverson supporting CAL Chapter's opposition to motions to dismiss below, p. 7.).

Only after the strikers had authorized ALPA to represent them and they had formulated a tentative strike settlement agreement, *inter se*, after CAL Chapter was dissolved and after all strikers selected the options provided for in the tentative settlement agreement, did ALPA present the proposed strike settlement agreement to Continental (Pet. App. A, 23-25). At that time ALPA represented Continental's pilots and the strikers. On the strength of that, the agreement and the signed options, Continental executed the agreement at ALPA's request to settle the strike. (See last five numbered pages, Exhibit 10 to affidavit of Bell supporting Continental's motion to dismiss below).

In addition to dissolving their union the former flight engineers directed their attorneys to dismiss this case, they notified the Flight Engineers International Association, AFL-CIO, (herein "International") of the action taken, and they appointed trustees of CAL Chapter to dispose of assets and pay bills (Pet. App. A, 25). Pursuant to the settlement agreement of October 10, 1960, fifteen former

flight engineers elected to return to work for Continental as pilots, and each of the remaining seven chose, were paid, and accepted $10,000 severance pay (Pet. App. A, 25). Included in the fifteen strikers who were re-employed as pilots was M. L. Kenyon, the former flight engineer whose proxy vote on the dissolution motion was the subject of some dispute in the court below (Paragraph 4, affidavit of Berry supporting Continental's reply to CAL Chapter's opposition to motions to dismiss below). The affidavits in support of the Continental and ALPA motions to dismiss together with exhibits attached thereto, such as the strike settlement agreement of October 10, 1960, the signed option selection forms and the minutes of the dissolution meeting of CAL Chapter, show, and the court below found (Pet. App. A, 27-30), that the minutes on their face appear to show proper and lawful dissolution, but even if the Kenyon proxy is questioned, 100% of the membership of CAL Chapter ratified and confirmed the dissolution (Pet. App. A, 29-30).

The court below also found:

> "ALPA and Continental subsequently entered into collective bargaining negotiations which resulted in a new collective bargaining agreement between them dated February 28, 1961. This agreement, which will remain in effect until August 31, 1962, covers all of Continental's flight deck crew members. The ALPA-Continental agreement of May 29, 1959, has expired and is no longer in effect." (Pet. App. A, 26)

The International attempted to impose a trusteeship on CAL Chapter after CAL Chapter had been dissolved. The constitution and by-laws of International were reviewed by the court below and it found no provisions therein relating to establishment of a trusteeship over a subordinate body (Pet. App. A, 26-27). Furthermore the constitution and by-laws of the International provide for autonomous local chapters (Exhibit 4, page 3 to affidavit of Berry supporting Continental's motion to dismiss below). The only requirement in the International constitution and by-laws concerning dissolution of local chapters is that no chapter be dis-

banded as long as a majority favor continuance (Pet. App. A, 29; Exhibit 4 to affidavit of Berry supporting Continental's motion to dismiss). Here it is undisputed that more than a majority favored dissolution (Pet. App. A, 29). CAL Chapter's constitution and by-laws require a two-thirds vote on dissolution. The minutes show such a vote (Pet. App. A, 24). The strike settlement agreement and signed option forms show unanimous ratification on or before October 10, 1960, of the dissolution vote on October 7, 1960 (Pet. App. A, 25).

The International has never been and is not now a party to this litigation, and has never represented any Continental employees (affidavit of Bell supporting Continental's motion to dismiss below; cf., Pet. App. A, 23). The facts found by the court below set forth fully the basis for its conclusion that CAL Chapter no longer exists, that the dispute has been settled, that CAL Chapter represents no employees of Continental and that any former employees it purports to represent have accepted termination pay and are now estopped to claim a right of employment (Pet. App. A, 23-30).

Petitioner filed a petition for rehearing[4] which was denied by the court below on December 7, 1961 (Pet. App. A, 31).

In case 518-60, the prior case between CAL Chapter and Continental, CAL Chapter asserted the same alleged violations of the Railway Labor Act as it did in the instant case and the district court ruled adversely to CAL Chapter on those issues (R. 461-475; 299-305). That decision is final and was never appealed. In the instant case the district court denied CAL Chapter's motion for preliminary injunction on the ground that, by the principle of collateral estop-

[4]Respondent Continental has caused said petition for rehearing to be certified as part of the record in this Court. As may be seen by reference to that document, the same arguments relied upon by the petitioner herein were made by it to the court below, which necessarily rejected them, since it had already found the operative facts to be insufficient to support petitioner's arguments.

pel by prior action, CAL Chapter was estopped from asserting the same alleged violations of the Railway Labor Act (R. 299-305).

ARGUMENT

I. The Decision Below is Clearly Correct and There is No Conflict of Decision.

In making its decision the court below had before it a wealth of factual material. Continental's motion to dismiss was supported by affidavits of Harrold W. Bell, Jr., Roy A. Berry, and Don R. Wilson. ALPA's motion is supported by an affidavit of Berry. Wilson is Continental's Vice President, Flight, Bell is Continental's Vice President, Personnel Relations, and Berry is a Continental pilot, formerly a flight engineer, who participated in the strike. Many documents were attached to the affidavits as exhibits. These included the strike settlement agreement of October 10, 1960, the option forms provided for in said agreement signed by all of the strikers, the minutes of the meeting of CAL Chapter at which that union was dissolved, the CAL Chapter constitution and by-laws, and the constitution and by-laws of International. CAL Chapter's opposition to the motions also included affidavits and exhibits. The record in the court below also included a transcript of record setting forth the district court proceedings in the instant case and in case 518-60.

The facts leading up to the final settlement of the dispute are carefully traced in the opinion of the court below (Pet. App. A, 23-30) and are summarized above in the Statement. The court below took great pains to avoid resolving disputed factual questions on the basis of the affidavits of record and based its decision solely on facts about which (it found) there was no dispute (Pet. App. A, 23, 24, 25).

The motivation for the strikers turning to ALPA and abandoning their own union is clear. By August 27, 1960, all of the strikers had been replaced (Pet. App. A, 23). Continental operated all of its flights after August 1, 1960. Prior to that date the strike caused only a small interruption of

flight operations.[5] The strike was a failure. Three of the striking flight engineers on and after September 13, 1960, started negotiations with ALPA to work out a merger of their group into ALPA (Pet. App. A, 23). According to the affidavit of Berry supporting ALPA's motion to dismiss (pp. 3-4), he and other flight engineers were reopening earlier merger talks between flight engineers and pilots. According to Berry's affidavit such a merger had been carefully investigated and almost consummated about May 15-18, 1959. So the talks were nothing new. The flight engineers had been involved in an unsuccessful strike for about two and one-half months. They reopened negotiations for merger, and representation by ALPA and by that method got ALPA to settle the strike and the overall dispute. The strike was abandoned not later than October 7, 1960, and ALPA brought the settlement agreement to Continental on October 10, 1960 (Pet. App. A, 23-24). Berry's affidavit makes clear, as the court below found (Pet. App. A, 23-25), that there was no bargaining between Continental and any of the strikers. CAL Chapter's claim of individual bargaining thus falls in the realm of utter fantasy. No evidence of such activity appears in its motion papers. Also, Berry's affidavits supporting the Continental and ALPA motions display the utter lack of any causal connection between any activity of Continental and the flight engineers' abandonment of their own union and merging into ALPA.

CAL Chapter was never certified by the National Mediation Board (Pet. 2, Note 2). It had been voluntarily recognized by Continental, but it lost its representative status during the course of the strike. Its membership abandoned it to get ALPA to settle the strike, and it was dissolved by its membership. This is clear from the findings of fact of the court below; the operative facts incident to these occurrences, as found below, completely fail to support CAL Chapter's allegations that they were the product of violations of the Railway Labor Act on the part of Continental (Pet. App. A, 23-26).

[5] See affidavit of Bell supporting Continental's motion to dismiss in the court below.

The court below also had before it the district court records in case 518-60 (R. 311 *et seq.*) and in the instant case (R. 3 *et seq.*). Those records show that CAL Chapter asserted the identical alleged violations of the Railway Labor Act in both cases. Those records also show the rulings adverse to CAL Chapter on these issues in the prior case, the fact that that decision is final and was not appealed, and that CAL Chapter could not litigate the same issues all over again in the instant case (See, R. 299-305).

Mere assertions by CAL Chapter, no matter how often repeated, cannot change the facts on which the court below based its decision that the case is moot. CAL Chapter claims violation of the Railway Labor Act by Continental in direct conflict with the record below. CAL Chapter claims that it has not been allowed to litigate the merits of the case, apparently ignoring the final decision in case 518-60 showing full bargaining and freedom on the part of both parties to take economic action. CAL Chapter seems to claim that Continental simply fired the strikers outright, ignoring the evidence and finding of the court below that they were replaced. CAL Chapter claims that Continental bargained with individual strikers, completely disregarding the clear finding of the court below that the course of events leading up to the strike settlement agreement involved negotiations between the strikers and ALPA. As a result of these negotiations, ALPA became the representative of the strikers, as well as Continental's pilots, and it then consummated the settlement agreement with Continental on behalf of the strikers.

Thus the foundation of petitioner's case on certiorari melts away. Its arguments are based on facts that did not and do not exist. Indeed the authorities agree that a case becomes moot where, as here, without coercion, the plaintiff has ceased to exist, the dispute has been settled, and the plaintiff (even if it had not ceased to exist) has no interest in the case or such an ephemeral interest that it lacks

standing to continue to maintain the lawsuit.[6] Furthermore the authorities support the decision of the court below that International has no standing to perpetuate the case.[7] For purposes of the petition for certiorari petitioner does not "place in issue the merits of the decision of the court below" on the questions of the dissolution of CAL Chapter and the purported trusteeship (Pet. 6, note 7). [The court below decided that the dissolution of CAL Chapter was legal and effective and that the attempted trusteeship was invalid and ineffective (Pet. App. A, 28-30).] *That decision must therefore be accepted as true on these points.* Hence there simply are no adverse parties remaining in the case. International is not a party and has no right or standing to maintain litigation on behalf of a non-existent entity.[8]

Petitioner, in an attempt to avoid the clear import of these decisions, cites cases relating to survival of actions in which

[6] *Little v. Bowers*, 134 U.S. 547 (1890); *Singer Mfg. Co. v. Wright*, 141 U.S. 696 (1891); *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308 (1893); *Mills v. Green*, 159 U.S. 651 (1895); *Brownlow v. Schwartz*, 261 U.S. 216 (1923); *Barker Painting Co. v. Local No. 714 Brotherhood of Painters, etc.*, 281 U.S. 462 (1930); *Lord v. Veazie*, 8 How. 251 (U.S. 1849).

[7] See cases cited note 8, *infra*.

[8] If petitioner does not challenge the finding below with respect to the invalidity of the attempted trusteeship, petitioner admits it lacks standing to prosecute this appeal, since it is apparent on the record that petitioner here is the International Union acting through the purported trustees of CAL Chapter. See, Pet. App. A, 27, 30. Even assuming, *arguendo*, that this case involved matters of public interest, a private party (International) without any interest in the subject matter of the litigation has no standing to raise the issue. See, *Boston Tow Boat Co. v. U. S.*, 321, U.S. 632 (1944). In that case the Tow Boat company intervened in a proceeding before the Interstate Commerce Commission involving another carrier. It sought to appeal from a decision adverse to the other carrier; however the right was denied as it had no standing to prosecute the appeal. The order in question was not determinative of the status of the Tow Boat company. See also, *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275 (1946), where this Court indicated that a union would not have standing to challenge the decision in a case involving *another* union and an employer. Compare, *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) and *Muskrat v. U. S.*, 219 U.S. 346 (1911) (private party without standing to challenge general validity of federal law); *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 558 (1937) (employer has no standing to raise constitutional rights of his employees).

the United States or its agencies, such as the NLRB, are actually parties to the litigation, the remedies sought or obtained by the Government or the agency are either prospective in effect or perpetual, and are based on specific findings of unfair labor practices or other violations of law by an agency or a court. None of those elements are present here and those cases have no bearing on the real question now before this Court. Rather this case presents only the orthodox attributes of a moot litigation and it is well settled that whenever a case becomes moot, a Federal court loses jurisdiction and must dismiss the case.[9]

Thus in *Barker Painting Co. v. Local No. 734 Brotherhood of Painters, Decorators and Paperhangers*, 281 U.S. 462 (1930) this Court refused to review an appeal from the judgment of the circuit court affirming the trial court's order dismissing a suit to enjoin two unions from calling a strike where, pending the appeal, all of the employees involved had returned to work and the job over which the dispute arose had been completed. This Court there stated:

> "Both sides desire that the Court should go further afield. But a Court does all that its duty compels when it confines itself to the controversy before it. It cannot be required to go into general propositions or prophetic statements of how it is likely to act upon other possible or even probable issues that have not yet arisen [citation omitted]. The controversy here was between the plaintiff and the painters in Somerville who prevented its finishing its job. If the case had needed to be considered on its merits, it would have been likely to involve a discussion more or less far-reaching of the powers of the Union, but the plaintiff could not impose a duty to go into that discussion when before the time for it the resistance had been withdrawn and the job had been done." 281 U.S. at 463-464.

Similarly, since the questions presented in the petition herein do not arise on the facts of the instant case, petitioner

[9] *Muskrat v. U. S.*, 219 U.S. 346 (1911); *United States v. Alaska Steamship Co.*, 253 U.S. 113 (1920).

is likewise disabled and "cannot require" this Court "to go into general propositions or prophetic statements of how it is likely to act" upon such other possible issues that have not arisen. See 281 U.S. at 462-463.

As recently as 1960 this Court has reaffirmed this position, in a case involving a labor dispute. See *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri*, 361 U.S. 363 (1960); see also *Amalgamated Assoc. of Street Ry. Employees v. Wisconsin Employment Relations Board*, 340 U.S. 416 (1951).

In reaching its decision in *Atomic Workers*, this Court relied upon its decision in *Harris v. Battle*, 348 U.S. 803 (1954). Concerning that case, this Court stated:

> ". . . In this court it was urged that the controversy was not moot because of the continuing threat of state seizure in future labor disputes. [Footnote omitted] *It was argued that the State's abandonment of alleged unconstitutional activity after its objective had been accomplished should not be permitted to forestall decision as to the validity of the statute under which the State had purported to act.* [Footnote omitted] . . . In finding that the controversy was moot, the Court necessarily rejected all of these contentions. 348 U.S. 803. Upon the authority of that decision the same contentions must be rejected in the present case. See also *Parker Co. v. Painters Union*, 281 U.S. 462; *Commercial Cable Co. v. Burleson*, 250 U.S. 360." 361 U.S. at 368-369. [Emphasis added]

In *Battle* therefore, this Court rejected the claim that mere allegations of illegal action prevented the case from becoming moot.

In its complaint, its opposition to the motions to dismiss and in its petition for rehearing CAL Chapter has repeatedly asserted in one form or another the violations of the Railway Labor Act claimed in its petition for certiorari. The similarity between the petition for rehearing below and

the petition for certiorari is striking. CAL Chapter has failed utterly in these attempts to persuade the lower courts that Continental violated the Railway Labor Act in any way. When the court below denied the petition for rehearing, it had already found and stated in its opinion facts which conclusively showed a lawful course of action by Continental, ALPA and the strikers. The evidence and the law support the findings of fact and conclusions of law of the court below, and the decision below is clearly correct. The decisions of this Court and of the courts of appeal cited by petitioner rest upon findings in those cases that *affirmatively established* that the union loss of majority or dissolution was the result of unfair labor practices by the employer. That just is not the situation here and therefore petitioner's cases are not applicable to this case. It would be a fruitless endeavor indeed to grant certiorari in this case in order to attempt to reconcile it with decisions in other cases based on completely different facts. The decision of the court below on the facts found, rather than being in conflict with decisions of this Court or courts of appeal, is, as shown above, entirely consistent with such authorities.

II. Certiorari Should Not be Granted Merely to Review The Findings of Fact by The Court Below Upon Which It Based Its Determination of Mootness.

The Questions Presented as stated by CAL Chapter in its petition are based on certain factual assumptions. Question 1 therein (Pet. 2) is based on Continental's allegedly "bargaining with the individual employees." Question 2 (Pet. 2) is based upon the assumption that the dissolution of CAL Chapter was induced by conduct of Continental violating the Railway Labor Act. Without such factual bases petitioner's case evaporates.

As above set forth the findings of fact of the court below conflict with CAL Chapter's view of the facts. Moreover these findings expressly negative any assertion of individual bargaining and set forth an entirely legal course of conduct. The record is indeed devoid of any evidence of illegal

conduct of Continental inducing the dissolution of CAL Chapter and, moreover, Berry's affidavits particularly show the lack of any causal connection between dissolution of CAL Chapter and conduct by Continental.

CAL Chapter's basic legal theory is that an employer cannot be allowed to profit from its own unfair labor practices. To arrive at the application of its legal theory CAL Chapter attempts to create a different case, factually, from the one before this Court. In effect it is asking this Court to review the findings of fact by the court below and to hold such findings erroneous so that its legal theory will have some force. If the findings of fact by the court below are sustained, CAL Chapter's legal theory is not applicable in any way.

In reaching its determination of the operative facts of this case the court below reviewed all of the affidavits and documentary evidence. It construed the strike settlement agreement of October 10, 1960, as well as the option forms signed by all strikers. It examined and reached conclusions concerning the minutes of the dissolution meeting of CAL Chapter. It examined and construed the constitutions and by-laws of CAL Chapter and International. It reviewed the efforts of International to impose a trusteeship on CAL Chapter and held such activity to be fruitless and ineffective. It determined from the affidavits and exhibits the course of events leading up to the settlement (Pet. App. A, 23). It carefully avoided deciding disputed fact questions (Pet. App. A, 23, 24, 25).

Petitioner argues that the court below would not heed its argument that the case could not be moot because, according to petitioner, the mootness was induced or caused by illegal conduct of Continental and ALPA. The court below certainly heard this argument because it was made with much force in CAL Chapter's opposition to the motions to dismiss and petition for rehearing. However the court below necessarily rejected this argument because it was baseless. The

operative facts, as set forth above and in the opinion of the court below, simply do not and will not support petitioner's argument.

In view of this posture of the case it is evident that a writ of certiorari should not issue. This Court has repeatedly declined to grant certiorari to review the findings of fact of the court below.[10]

III. There is No Important Question of Federal Law.

The underlying issues giving rise to the dispute in this case arise from the economic, operational problem of working out the flight crew complement on jet aircraft. The specific issue before this Court is whether to review the determination of the court below that CAL Chapter's suit against Continental and ALPA is moot. That decision is based entirely on the facts of this case and, as shown above, has no broader implications.

The decision of the court below reveals the absence of any novel applications of the Railway Labor Act. It is clear that no provision of the Railway Labor Act prohibits a group of strikers from abandoning their own union and turning to another to get their strike settled and in fact to settle the entire dispute. The federal agency concerned with representation disputes under the Railway Labor Act was fully informed and expressed no objections. Moreover CAL Chapter failed to invoke the services of the National Mediation Board to establish representation rights after Continental had notified it and the Board that Continental no longer recognized CAL Chapter as the bargaining agent for flight engineers. Negotiating between themselves first, the strikers and ALPA reached a tentative strike settlement agreement satisfactory to them. The strikers authorized ALPA

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[10] *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938); *United States v. Johnson*, 268 U.S. 220 (1925); *New York Cent. & H. RR. Co. v. Kinney*, 260 U.S. 340 (1922); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924); *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1918); See, Robertson & Kirkham, *Jurisdiction of The Supreme Court of The United States* (Wolfson & Kurland ed. 1951) ¶¶ 310, 333.

(as recited in the settlement agreement) to act for them for all purposes of that agreement. ALPA then presented the agreement to Continental. Continental, recognizing that ALPA represented the strikers as well as its pilots, negotiated with ALPA and signed the agreement settling the strike.

Petitioner cites cases of public rights and public interest. Those cases for the most part are cases in which the United States, the NLRB or some other agency are parties to the litigation. Those cases also are ones in which there were specific findings that a party had actually violated a federal law. In those cases there were injunctions or NLRB cease and desist orders which of their very nature do not become moot merely because a party ceases its unlawful activities. Such decrees and orders operate prospectively and continuously. In those cases involving unions as parties there was at least either a shell or viable entity to receive the benefit of the order; or the Government or an agency was engaged in the course of its statutory duty of enforcing and vindicating a federal law. None of these situations exist here.

Indeed the absence of such elements in the instant case is apparent. Here no violations have ever been found regardless of the frequency with which they have been asserted, nor would the facts, as found, support such a conclusion. Hence there is no public right to be vindicated. Here neither the United States nor any agency is a party. Indeed there is no party plaintiff in existence and that fact is admitted by petitioner for the purposes of the petition for certiorari. Here there is no continuing prospective decree or order of any court or agency. Rather, here there is a complete settlement of a dispute involving twenty-two men and a now nonexistent association of which they comprised the entire membership, and, notwithstanding the settlement, a third party (International) with no interest or standing is attempting to keep the lawsuit alive.

As respondent has shown above, the operative facts, as found by the court below, do not and will not support petitioner's allegations. The lower court found the facts to be quite different from those alleged by petitioner, and based on its findings necessarily refused to accept petitioner's allegation of violations of the Railway Labor Act. In such circumstances, it is evident that petitioner relies upon authority which has no application to the present case and that no public interest is involved. In reality, it is merely asking this Court to re-examine the findings of fact of the court below, for only by reversing numerous of those findings (which this Court would have to find were clearly erroneous) could this Court apply petitioner's legal theory of the case in order to reverse.[11] The lower court having found that events pending appeal had rendered the case moot and having necessarily rejected petitioner's assertions that these results were attributable to respondent's violation of the Railway Labor Act as unsupported on the undisputed facts of record, it properly held the case to be moot and properly entered its order of dismissal. Since its decision was upon the particular facts before it, and therefore does not involve either erroneous or conflicting application of the decisions of this Court or other courts of appeal or present issues of major importance in the administration of the Railway Labor Act, this case is not one in which a writ of certiorari should issue.

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[11] If certiorari should be granted, Continental will argue that the findings of fact of the court below, not being clearly erroneous, must be sustained and that those findings fail to support petitioner's allegations that this case reached its present posture because of Continental's alleged violations of the Railway Labor Act. Moreover respondent will maintain that since these facts will not support petitioner's allegations of Railway Labor Act Violations, the case *does not* involve matters of public interest which would permit its survival after all parties having any interest in the subject matter of the litigation have settled the dispute.

CONCLUSION

For the reasons stated above, it is therefore respectfully submitted that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1961

No. 820

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, CAL CHAPTER,

Petitioner,

vs.

CONTINENTAL AIR LINES, INC. and THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Opinion Below

The opinion of the Court of Appeals is not yet officially reported. It is unofficially reported at 49 LRRM 2951.

Question Presented

Did the Court of Appeals err in dismissing an appeal from a denial of a preliminary injunction and directing dismissal of the action on grounds of mootness where before the appeal was heard

(a) an unincorporated association that was the sole plaintiff and appellant dissolved itself by action of its members pursuant to its Constitution and by-laws and directed its attorneys to discontinue litigation initiated in its name;

(b) the dispute involved in the action had been settled, and

(c) the sole plaintiff and appellant represented no employees of the carrier and the former employees that it claimed to represent had, on the advice of counsel for Petitioner, accepted termination pay which they never offered to repay and were estopped to claim a right of employment?

Statement

Respondent, Air Line Pilots Association, International, ("ALPA") is a labor organization that represents flight deck crew members in the service of all scheduled airlines in the United States including respondent, Continental Air Lines, Inc. ("Continental").

This action was brought by an unincorporated association, the Continental Airlines (CAL) Chapter of the Flight Engineers' International Association, AFL-CIO, hereinafter referred to as "CAL Chapter". Petitioner does not challenge the fact that CAL Chapter, the sole plaintiff and appellant in this action, was dissolved in accordance with proper procedure under the applicable Union by-laws and that no effective trusteeship over that chapter was established (see Pet. 6, note 7). The dissolution of the CAL Chapter took place while its appeal from an order of the District Court denying its motion for a preliminary injunction was pending.

The complaint in this action, printed at pages 3 to 15 of the Transcript of Record,* prayed for a declaratory

* Page numbers in the printed Transcript of Record will hereinafter be referred to by letter "R" followed by page number(s) in parentheses.

judgment that a collective bargaining agreement between defendants Continental Air Lines, Inc., herein referred to as "Continental" and the Air Line Pilots Association, International, AFL-CIO, herein called "ALPA", was invalid in certain respects as violative of the Railway Labor Act. The complaint also sought injunctive relief to prevent Continental and ALPA from engaging in conduct to implement this agreement. The District Court denied plaintiff's motion for a preliminary injunction on the grounds that the contentions made by plaintiff had been decided adversely to it in a prior proceeding which barred plaintiff from relitigating those issues in this case (R. 299-305).

Plaintiff appealed from the order denying it a preliminary injunction, and the correctness of that order was the only question before the Court of Appeals when it held the appeal and the action moot because: "(1) CAL Chapter, the sole plaintiff and appellant, is no longer in existence; (2) the dispute involved in the lawsuit has been settled; and (3) CAL Chapter represents no present employees of Continental and any former employees whom it purports to represent have accepted termination pay and are now estopped to claim a right of employment" (Pet. 23, 30).

As has been shown, petitioner does not challenge the dissolution of the sole plaintiff in this action and the invalidity of the trusteeship that the Flight Engineers' International Association, AFL-CIO, attempted to establish over CAL Chapter. These were part of the basis for the decision of the Court below that the appeal and the action by CAL Chapter were moot. Instead, petitioner argues that even if the sole plaintiff herein was dissolved the Court of Appeals erred because dissolution of CAL Chapter was an act pursuant to an alleged conspiracy by Continental and ALPA to establish by an agreement between them dated May 29, 1959 terms and conditions of employment of employees represented by CAL Chapter and to eliminate CAL Chapter as representative of the flight engineers

employed by Continental; and, further, that the dissolution of CAL Chapter was brought about by individual negotiations between the carrier and the members of that chapter.

Petitioner's concession that dissolution of CAL Chapter was properly carried out and that no valid trusteeship had been established over CAL Chapter has the effect of emphasizing the correctness of the decision below that there exists at present no party plaintiff in this action. If there are acts of Continental and ALPA that can be the subject of a complaint, CAL Chapter cannot complain of them since it is not in existence.

But turning to the allegations made in the Petition for Certiorari, it is apparent from the opinion of the Court of Appeals and the record on the motions to dismiss the appeal that was before that Court that there were no individual negotiations between the carrier and members of the former CAL Chapter. A majority of the members of that chapter authorized ALPA to represent them, and it did represent them in arriving at an agreement settling an existing strike which secured for 15 strikers a return to work as members of the flight deck crew on jet aircraft and for the remaining 7 strikers, on the advice of Messrs. Gromfine and Hackler, attorneys for petitioner, $10,000 termination pay which they have never offered to repay. See page 7 of the affidavit of Glenn B. Iverson, attached to the "Opposition Of Appellant To Motions Of Appellees To Dismiss Appeal."

As for the allegations of a conspiracy between Continental and ALPA, the record contains ample proof that no such conspiracy ever existed. At the time that this action was commenced, ALPA was the duly recognized representative of the pilots employed by Continental, while CAL Chapter had been recognized by that carrier as the collective bargaining representative of its flight engineers. There had been no determination by the National Media-

tion Board with respect to the craft or class of flight deck crew members employed by Continental. *Cf., In re Representation of Employees of United Air Lines, Inc.—Flight Deck Crew Members*, 3 NMB Determinations of Craft or Class 56 (1961); *UNA Chapter, FEIA* v. *National Mediation Board*, 294 F. 2d 908 (D. C. Cir. 1961), *cert. denied*, 368 U. S. 956 (1962).

The factual situation underlying this action springs essentially from the introduction of Boeing 707 turbojet equipment into scheduled service by Continental on June 8, 1959 (R. 95). Prior to that date, the four-engine piston driven aircraft operated by Continental carried a flight deck crew consisting of two pilots represented by ALPA, and a flight engineer represented by CAL Chapter. The flight deck crew on all other types of equipment operated by Continental (twin-engine piston driven and four-engine turboprop) consisted solely of pilots represented by ALPA.

With the introduction of the newer and faster turbojet equipment, it was generally recognized in the industry that the safe operation of such aircraft required additional piloting assistance in the cockpit and maximum crew coordination with full cross-qualification of all crew members, an approach which had theretofore been adopted with respect to piston equipment by some carriers but not by others (R. 177-179). Accordingly, ALPA sought to provide, through collective bargaining with the carriers, for a crew of three pilot-qualified personnel for the operation of jet aircraft (R. 179). On the carriers which had been operating piston equipment with a crew consisting of three pilot-qualified persons, the onset of the turbojet presented no problem of crew complement. For those carriers, on the other hand, who had been operating piston equipment with two pilots and a flight engineer not required to be pilot-qualified, the transition to a properly qualified crew of turbojets presented some difficulties.

For the latter group of carriers, in which Continental was included, two alternative methods of achieving a basically qualified crew were presented. The flight engineer under this agreement might become pilot qualified, and the jet operation could then be conducted with a three-man crew. This was the approach endorsed by ALPA (R. 179-180). Or, as some of the carriers later proposed, a third pilot could be added to the piston aircraft crew resulting in a crew on jet equipment of four men—three pilots and a flight engineer who need not be pilot qualified (R. 179).

It was first demonstrated on Eastern Air Lines, one of the carriers which had been operating piston aircraft with a flight engineer not required to be pilot qualified, that this choice of alternatives was not to be a simple one. In 1957, anticipating the introduction into service by Eastern of the Douglas DC-8 airplane, ALPA bargained for a fully pilot qualified three man crew. The Eastern Air Lines Chapter of the Flight Engineers International Association, on the other hand, resisted the qualification of its flight engineers as pilots, and instead contended for a separation of the training and duties of the flight deck crew members (R. 180).

Negotiation was followed by mediation, and a strike on Eastern over this crew complement question seemed imminent. The President of the United States, however, acting under Section 10 of the Railway Labor Act to avert the strike, appointed a Presidential Emergency Board, which after many months of hearings, thousands of pages of testimony, and hundreds of exhibits, recommended that the safe operation of turbojet aircraft required that all crew members be pilot qualified (R. 181-187). Eastern and ALPA accepted the recommendations of the Board, which had been submitted to the President and were approved by him. The Board's recommendations were, however, rejected by the FEIA (R. 186).

ALPA and Eastern thereupon resumed negotiations on the issue of crew complement. An agreement was concluded between them on November 12, 1958 (R. 188). A copy of this agreement was annexed to the affidavit of Clarence N. Sayen below as Exhibit 5. This agreement was executed prior to any agreement between Eastern and the FEIA. It provides for three pilot qualified crew members on jet aircraft, and in this respect is identical to Section 26(h)(1) of the Agreement between Continental and ALPA which is being challenged herein (R. 188).

Eastern and the FEIA were still unable to agree upon the crew complement of Eastern's turbojets. Eastern wished to operate these aircraft with a crew of three, all of whom were pilot qualified. Eastern had proposed that the flight engineer be pilot qualified and be the third crew member. The FEIA, however, insisted upon the retention in the jet cockpit of the non-pilot-qualified flight engineer. A stalemate, followed by an engineers' strike of 39 days, ensued. Finally, Eastern acceded to the FEIA by providing a position for the non-pilot-qualified flight engineer on its jet aircraft (R. 193-194).

Thus, it is obvious that nothing in the ALPA-Eastern agreement of November 12, 1958, prevented the FEIA from placing a flight engineer on the company's jet equipment. By the same token, nothing in the Continental-ALPA agreement of May 29, 1959, calling for three pilot-qualified persons on jet equipment, prevented CAL Chapter, by negotiation, strike or any other appropriate method, from assuring the presence of a fourth man on Continental's jet equipment (R. 194). Prior to the agreement of May 29, 1959, which is challenged in this action, ALPA had entered into similar agreements with American Airlines, Pan American World Airways, United Air Lines and Trans-World Airlines (R. 195-199). In each of these cases with the exception of United, where the flight engineers accepted pilot qualification as a condi-

tion of service on the jet, the agreement between ALPA and the carrier providing for three pilot-qualified crewmen on jet equipment was in no way inconsistent with the agreement between the FEIA and the carrier placing a flight engineer on the jet (R. 198-199). On each of these carriers the FEIA successfully negotiated a position for a non-pilot qualified flight engineer on jet equipment, an agreement between the carrier and ALPA, comparable to that challenged herein, being present.

On September 5, 1958, Continental publicly announced that it intended to adopt and implement the recommendations of the Eastern Air Lines Presidential Emergency Board with respect to the jet equipment which was to be delivered nine months thereafter (R. 81-82; Exhibit 1 to affidavit of B. J. Anderson below). At the time of this announcement, the collective bargaining agreement in effect between Continental and CAL Chapter contained a "scope" clause, which guaranteed a place for the flight engineer on all aircraft subsequently acquired by Continental. Extensive negotiations followed, in which Continental bargained for the deletion of the "scope" clause from the agreement and CAL Chapter urged the extension of that clause so as to require an employee covered by its agreement with Continental to be a member of the crew of any aircraft carrying a crew of more than two persons. CAL Chapter and Continental agreed that this "scope" clause be omitted from the new contract concluded by Continental and CAL Chapter less than two months later, on October 31, 1958 (R. 82, 95).

It is appropriate now to discuss the circumstances which led to the Continental-ALPA agreement of May 29, 1959, the agreement which CAL Chapter contended was invalid. In November, 1958, ALPA, in accordance with Section 6 of the Railway Labor Act, served a notice of proposed changes in the collective bargaining agreement upon Continental (R. 82). A copy of these pro-

posed changes is annexed as Exhibit 2 to the affidavit of B. J. Anderson below. In essence, ALPA proposed a minimum pilot crew on jet aircraft of three pilot-qualified persons (R. 82-83). Negotiations between ALPA and Continental followed, at which Continental took the position that it intended to implement the recommendations of the Eastern Air Lines Presidential Emergency Board (R. 83). Thus, it requested that ALPA prepare a cross-seniority proposal, designed to protect the job and seniority rights of the flight engineers, and offering them the opportunity to qualify for the job of (pilot qualified) second officer on the jet. It was intended that flight engineers should have seniority under both the ALPA and FEIA agreements at the same time. This corresponds to a specific recommendation of the Eastern Presidential Emergency Board, which, in its Report to the President, stated:

> "* * * under the program we recommend, the jobs for flight engineers will not be restricted to piston and turboprop airplanes. For those who can and are willing to do so, we propose that sufficient pilot training be offered at the carrier's expense to qualify them for jobs on any aircraft, including the turbojets. * * *
>
> "A flight engineer taking such pilot training will presumably do so on his own time, although at company expense. If he elects to serve as a copilot thereafter, * * * his seniority on the flight engineer list should continue to accrue for a period of time sufficient to enable him to be assured that he has not lost his job protection in the event he becomes subject to furlough as a junior copilot. * * *
>
> "This will make it necessary that appropriate and coordinated seniority provisions be added to the collective bargaining agreements of both FEIA and ALPA. * * *

> "Under such a program those who have been fearful and suspicious can be completely disabused. The purpose will be primarily to conduct the operation of turbojet aircraft on the most cautious and safe basis, in the paramount interest of the public. At the same time, all the legitimate job equities and interests of incumbent employees will be satisfactorily protected" (Report to the President by Emergency Board No. 120, pp. 23-25 (1958); Report to the President by Emergency Board No. 121, pp. 21-23 (1958)).

ALPA prepared a cross-seniority proposal of the type recommended by the Eastern Board. Agreement of Continental, CAL Chapter and ALPA to such a proposal was contemplated (R. 83). The cross-seniority proposal was submitted to Continental in December, 1958, and that carrier delivered this proposed agreement to CAL Chapter for its consideration (R. 84). There followed in April and May, 1959, a number of joint meetings between ALPA and CAL Chapter representatives, at which the cross-seniority arrangement was discussed in great detail and a merger of ALPA and CAL Chapter, proposed by the latter, was taken under consideration (R. 84-85). The proposed cross-seniority agreement was, at these meetings, reduced to final form acceptable to all the representatives, but the meetings were recessed to permit execution by CAL Chapter of a finalized agreement. A final meeting between ALPA and CAL Chapter representatives, at which the executed agreements providing for cross-seniority with full protection for existing job rights were to be exchanged, was scheduled for May 18, 1959 (R. 85). Thereafter, CAL Chapter informed Continental that it would neither agree to the cross-seniority proposal nor hold further discussions with regard thereto (R. 85).

Unable to secure the agreement of CAL Chapter to a proposal which would permit Continental to operate its

turbojet equipment under conditions recommended by the Eastern Board while at the same time preserving "all the legitimate job equities and interest of incumbent employees," Continental and ALPA resumed negotiations and, on May 29, 1959, concluded the agreement challenged in this action (R. 85). This agreement provided for a *minimum* crew of three pilot-qualified crew members, including a second officer, on jet aircraft, but the implementation of this second officer provision was deferred until April 1, 1960, to permit sufficient time for Continental and CAL Chapter to resolve the place, function and qualification of the flight engineer on Continental's jet equipment (R. 85-86).

Following the execution of its agreement on May 29, 1959, with ALPA, Continental offered to eight flight engineers who possessed pilot qualifications the opportunity to secure a position on the pilots' seniority list (R. 86, 111). This was done by placing their names on that list, and requiring them to affirmatively signify their desire to remain on that list, if they wished to do so. This offer in no way affected CAL Chapter, the membership in that chapter of the flight engineers involved, their positions on the flight engineer seniority list, or their coverage under the CAL Chapter agreement with Continental. It was the position of Continental that the cross-seniority of those flight engineers who possessed pilot qualifications "not only added to their usefulness to the Company but added to their own job security and gave them wider choice as to positions in flight deck crews" (R. 111-112). In addition, Continental contemplated the hiring of additional pilots shortly thereafter and it wished first to extend job opportunities to those already in its employ (R. 86). All but one of these individuals subsequently requested that their names be removed from the pilots' seniority list, however, and each such request was respected by Continental (R. 112).

In September, 1959, pursuant to the 1958 CAL Chapter-Continental agreement and to Section 6 of the Railway Labor Act, Continental served on CAL Chapter a notice of proposed changes in the 1958 agreement. In this notice, Continental stated its proposal to operate jet aircraft with a three-pilot crew upon the expiration of the 1958 agreement with CAL Chapter or when agreement with CAL Chapter was reached (R. 96). Mediation followed after an impasse had been reached, and both CAL Chapter and Continental declined the National Mediation Board's proffer of arbitration on the issue (R. 96). In April, 1960, CAL Chapter, still unable to reach agreement with Continental on the question of crew complement on jet equipment, announced its intention to strike on May 1, 1960.

Continental commenced an action in the United States District Court seeking an injunction to prevent the strike, as well as damages (R. 311-322). By judgment dated May 18, 1960, Judge Yankwich denied Continental's motion for a preliminary injunction and dismissed the complaint in the action (R. 475). As the basis for its decision, that Court concluded that the action grew out of a labor dispute as defined in the Norris-LaGuardia Act, thus depriving the Court of jurisdiction to issue an injunction, that all of the procedures and waiting periods under the Railway Labor Act had been exhausted and that "the parties to the labor dispute are no longer bound to observe any further waiting period before resorting to economic action" (R. 471-473).

Thereafter, CAL Chapter announced a new strike deadline of May 22, 1960. ALPA thereupon advised Continental of its intention to respect the CAL Chapter picket lines (R. 88). On May 21, 1960, Continental applied *ex parte* to the Federal Court in Denver for a restraining order against such action by ALPA, which order was granted (R. 88). CAL Chapter's strike was thereafter postponed indefinitely.

On May 29, 1960, a full year after the execution of the ALPA-Continental agreement challenged herein, Continental put into effect the second officer provisions of that agreement (R. 109, 114). CAL Chapter instituted this action on June 1, 1960, alleging a conspiracy between ALPA and Continental (R. 3-15).

All carriers now operating turbojet equipment in domestic air carrier operations do so with a crew which includes three pilot-qualified crew members. In some cases, these three pilots constitute the total crew on the jet; in others, a fourth—a flight engineer who is not qualified as a pilot—is carried (R. 207).

The facts recited above make it clear that what was involved in the instant case was a contract between Continental and ALPA providing for the crewing and training of pilot members of the flight deck crew on turbojet aircraft that was directly in line with an established contractual pattern in the air transport industry for dealing with this matter. This contract did not prevent CAL Chapter from representing its members. Indeed, several alternatives were left open to CAL Chapter. It could proceed as had the FEIA Chapters on Eastern, American, Pan American and TWA to negotiate a position on jet equipment for a non-pilot-qualified flight engineer, a fourth flight deck crew member. It should be noted that the May 29, 1959 agreement between Continental and ALPA provided only for a *minimum* crew. Or CAL Chapter could accept pilot qualifications for its members and by providing for cross seniority and prior rights of its members to the third seat on turbojet aircraft continue to represent the third crew member on that equipment. Another alternative, which CAL Chapter rejected after an agreement had been reduced to final form, was for the CAL Chapter members to accept pilot qualifications and merge with ALPA. See page 13-14, *supra*.

The events which followed the May 29, 1959 agreement between Continental and ALPA reflect CAL Chapter's

efforts to bargain for the alternative of a position for a non-pilot qualified flight engineer on turbojet equipment and Continental's unwillingness to make such an agreement. CAL Chapter did not lack an opportunity to bargain for the employees it represented to secure this objective, but it was unable to secure Continental's agreement to the establishment of a four man turbojet flight deck crew in its operations. This should be contrasted with the success of various FEIA chapters in securing such an agreement on the group of carriers of which Eastern is typical.

It was in the light of this factual background that, after more than three months of a strike by CAL Chapter against Continental, the strikers authorized ALPA to represent them in negotiating a settlement of the strike and took the actions, set forth in the opinion of the Court of Appeals and the record below, dissolving CAL Chapter and settling the dispute with Continental that gave rise to this suit by CAL Chapter. It was on the basis of these record facts that the Court below held the appeal and the action by CAL Chapter moot.

Argument

The Questions Presented on page 2 of the petition for a writ of certiorari are fabricated questions that have no basis in the record or in the decision of the Court of Appeals. The actual question presented by the record and the decision below is a narrow one of mootness of an appeal from an order denying a motion for a preliminary injunction and of the underlying action, resulting in a failure of jurisdiction because of the non-existence of a "case or controversy". This question the Court of Appeals decided in a reasoned opinion that is in full accord with the recent decision of this Court in *Local No. 8-6, Oil, Chemical and Atomic Workers International Union* v. *Missouri*, 361 U. S. 363 (1960).

The instant case involves no conflict of decision and does not raise any question of importance that requires

determination by this Court. Indeed, petitioner concedes one of the basic grounds upon which the Court below found that this case is moot.

It is clear that the decision of the Court below was based on well-established principles of law and that there is no basis for further review by this Court.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 820

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, CAL CHAPTER, PETITIONER

vs.

CONTINENTAL AIR LINES, INC. AND THE AIR LINE PILOTS ASSOCIATION INTERNATIONAL, AFL-CIO, RESPONDENTS

REPLY BRIEF OF PETITIONER

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CONTINENTAL AIR LINES, INC. AND THE AIR LINE PILOTS ASSOCIATION INTERNATIONAL, AFL-CIO, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

1. In its argument in opposition to this Petition, Respondent Continental sets up a straw man and proceeds to destroy it with considerable vigor. The heart of the opposition by Continental is that Petitioner, CAL Chapter, is merely seeking to obtain a review and reversal by this Court of certain findings of fact by the Court below upon the basis of which that Court made its determination of mootness.

There is no substance whatsoever to this assertion. CAL Chapter says, without qualification, that the decision of the Court below dismissing this suit on grounds of mootness cannot stand even if every finding of fact by the Court below is accepted. This Petition is not directed at the findings of the Court below on the issues the Court considered relevant. It is directed at the failure of the Court to recognize the relevancy of the issues it ignored. The findings of the Court below are devoted exclusively to the issue of whether CAL Chapter was effectively dissolved and

whether the parent organization of that union succeeded in properly establishing a trusteeship. Having found that the dissolution was effective, and that the trusteeship was not effective, the Court simply concluded that "the sole plaintiff and appellant no longer exists," and therefore that "this appeal and case is now moot." (Pet. App. A 30.)

Whether or not those findings are correct, the legal conclusion of mootness is wrong; and it is to that conclusion that this Petition is directed. For the Court below has ignored completely the questions of whether the conduct by Continental which led to the dissolution of CAL Chapter was lawful; whether the dissolution was a direct and natural consequence of a course of unlawful conduct by Continental (particularly the execution of a flight engineer agreement with ALPA and the refusal to continue to recognize and deal with CAL Chapter); and whether, if the consequence of mootness is to prevent remedying statutory violations by Continental, the case can be considered moot. Not a single word in the opinion of the Court below is directed to these critical questions.

Indeed to this day, *no Court* has passed upon the question of whether the conduct of Continental, commencing with the May 29, 1959, contract with ALPA and ending with the strike settlement made with the individual strikers and ALPA on October 10, 1960, violated the Railway Labor Act. And yet, under the decisions of this Court reviewed in the instant Petition, there can be no conclusion of mootness without considering that question. The fact that CAL Chapter, in its Petition for Rehearing below, raised this question and that the Petition was denied, does not demonstrate, as Continental repeatedly asserts, that the Court below ruled upon this question. The denial of the Petition for Rehearing—without reasons or opinion—demonstrates only that the Court below considered the issue of whether Continental had violated the Act to be irrelevant. And that is precisely the error we are asking this Court to correct.

Moreover, the suggestion by Continental (Cont. Br. 4,

7, 10) that in a "prior case" designated as 518-60 (R. 311 ff.) a U. S. District Court had ruled that the conduct of Continental which preceded the strike by the flight engineers was lawful is a complete misrepresentation of the facts. In that case Continental brought suit to enjoin the then threatened strike by CAL Chapter on the ground that the strike would be unlawful because, as Continental alleged, CAL Chapter had not yet completed the procedural requirements and waiting periods that must be followed under the Railway Labor Act before a union may strike. In 518-60 the Court rejected Continental's contention. It ruled that CAL Chapter had satisfied the procedural requirements and waiting periods and that, no unlawful objective of the strike having been claimed or shown, the Union was free to strike. The Court did *not* rule upon the question of whether the conduct *by Continental* which provoked the strike (the refusal to continue to recognize CAL Chapter and the negotiation with ALPA instead of FEIA of a contract affecting flight engineers) was lawful. Having found that a strike by CAL Chapter would in no way violate the law, the Court had no alternative but to deny the injunction, whether the conduct *by Continental* which provoked the strike was unlawful or not. Nothing in the Railway Labor Act makes the legality of a strike turn upon the question of whether the carrier's conduct which caused the strike was lawful.

Despite this, the District Court in the instant case ruled that the decision in 518-60 was res adjudicata of the central issue of the legality of Continental's conduct raised by the instant complaint. From that decision, which CAL Chapter believes was plainly wrong, the appeal was taken to the Court below. However, the Court below did not reach that issue because of its determination that with the subsequent dissolution of CAL Chapter the case became moot.

In the light of these facts, Continental's assertion that CAL Chapter has had its day in court on the question of the legality of the conduct of Continental involved in the instant complaint, let alone that this question has already

been finally decided adverse to the position of CAL Chapter, is nothing less than unbelievable.

2. Continental recognizes the force of those many decisions cited in the Petition which hold that an employer may not claim mootness and thereby take advantage of the dissolution of a union, or the loss of the union's majority status, which comes as the natural consequence of an unlawful refusal to bargain or of other conduct the normal effect of which is to undermine the employees' support of the union. It seeks to escape the impact of those decisions by emphasizing the facts found by the Court below to the effect that the movement to dissolve CAL Chapter started with those of the striking members of CAL Chapter who wished to discontinue the strike, and that Continental entered into the agreement with ALPA and the individual flight engineers settling the strike only after those employees had gone to ALPA and obtained its aid in preparing that agreement.

Even if those findings are accepted as supported by the record, they are of absolutely no consequence in this case. The plain lesson of *Medo Photo Supply Co.* v. *N. L. R. B.*, 321 U.S. 678 (1944), is that: "The statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer, even though the employees consent . . . or the employees suggest the conduct found to be an unfair labor practice . . ." (321 U.S. at 687).[1] Continental's exe-

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[1] The Court is there speaking of the National Labor Relations Act; but the principle is exactly the same under the Railway Labor Act. *See: Texas & N. O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930). In a decision issued subsequent to the filing of the instant Petition, the Fourth Circuit stated:

> "In cases where an employer's unfair labor practices and refusals to bargain so weakened the union that it no longer represented a majority of the employees, the courts have nonetheless consistently required the employer to cease and desist its unfair labor practices and bargain with the union." (Citation omitted.) *IAM* v. *International Aircraft Services*, ___ F. 2d ___, 49 LRRM 2976 (CA 4), March 21, 1962.

cution of the strike settlement agreement was but the culmination of an unlawful course of conduct, already fully reviewed in the Petition, which began in May of 1959 when Continental first undermined CAL Chapter by agreeing to recognize ALPA instead of continuing to recognize CAL Chapter as the representative of flight engineers, although the flight engineers had in no way changed their designation of representatives. Whether or not Continental directly solicited the dissolution of CAL Chapter, it may not escape a court order remedying that conduct by claiming that what it did is what the employees ultimately were driven to ask for as a direct consequence of that unlawful conduct.[2]

Nor may Continental hide behind the fact that it was ALPA that acted as the agency through which the strike settlement was ultimately arrived at. Where, as a result of an employer's illegal conduct, a union's status as a functioning majority representative is destroyed, the fact that the employees may then turn to another union, rather than attempt to deal on their own, gives the employer no right to deal with that other union. For, under the circumstances, the second union cannot possibly be regarded as the freely designated representative of the employees. Precisely that situation was presented in *National Licorice Co.* v. *N. L. R. B.*, 309 U.S. 350 (1940), as well as in *International Assn. of Machinists* v. *N. L. R. B.*, 311 U.S. 72 (1940). In neither case did this Court permit an employer to escape from the consequences of illegal conduct which led to the

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[2] As the Third Circuit pointed out in a very comparable situation:

"The employees' petitioning of May 25 purporting to withdraw the union's authority as bargaining agent, was the expected harvest which the respondent reaped in due season from what it had theretofore sown and purposefully cultivated until maturity. In no event, could the employer discredit a duly designated bargaining agent by refusing to bargain with it and then avail himself of the bargaining agent's loss of majority support which has thus been brought about by the employer's own conduct." *N. L. R. B.* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 42 (CA3, 1941). (Citations omitted.)

charging union's loss of its majority by claiming that another union had demonstrated that it was now the representative of a majority of the employees.

This principle is all the more applicable in this case, where the record so plainly shows that the ultimate agreement settling the strike is the product of individual bargaining, a practice that is the antithesis of the kind of collective bargaining required by the Act. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342 (1944). Continental's assertion (Cont. Br. 10) that the findings of the Court below permit no conclusion that there was individual bargaining, is plainly false. That is precisely what the Court below did find. It found that the strike settlement agreement signed by Continental on October 10, 1960, was also signed "*by ALPA and some of the twenty-two striking flight engineers.* Whether it was actually signed by all of them is in dispute." (Pet. App. A. 25 [Emphasis added].)[3] The Court below then finds (Pet. App. A. 25, fn. 3) that if there were any of the individual flight engineers that did not sign the strike settlement agreement, they accomplished the same purpose by *individually* signing a "(b) or (c) option." These options were agreements directly between the individual flight engineers and Continental. If that is not individual, as distinguished from collective, bargaining, the term has no meaning.

The force of the decisions relied upon in the Petition is unimpaired by anything in Continental's opposition. The applicable principle is crystal clear. A suit to vindicate the right under the Railway Labor Act to collective bargaining by a freely selected representative cannot become moot by virtue of the fact that the carrier's success in trampling on that right manifested itself in a destruction of the union the employees had selected. That principle, so important

[3] The agreement itself refers to "each of the flight engineers who are signatories to this Agreement." See p. 5 of Exhibit 5 attached to affidavit of Roy A. Berry, accompanying the "Motion To Dismiss By Appellee Air Line Pilots Association, International, AFL-CIO" which is on file with the Clerk of this Court.

to any meaningful administration of the Railway Labor Act, was ignored by the Court below.

3. Little need be said about the Brief in opposition to this Petition filed by ALPA. ALPA recites some history designed to suggest that the conduct of Continental in refusing to continue to recognize CAL Chapter as the representative of flight engineers on jet aircraft was motivated by economic considerations which dictated a change in the qualifications required of its flight engineers on jet aircraft. Even if this were true, it is totally irrelevant, and was in no way relied upon for the conclusion of the Court below that is at issue in this Petition. And, aside from that fact, it is too late in the day to suggest that the compliance of a carrier with the duties imposed by the Railway Labor Act are contingent upon economic convenience or necessity.

CONCLUSION

For the reasons spread upon the papers in this case, this Petition should be granted.

Respectfully submitted,

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